TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~506.~~ 215

WILLIAM MORAN AND ROWLAND HOWES NOBLE,
PLAINTIFFS IN ERROR,

vs.

JOHN G. PRATHER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED OCTOBER 7, 1873.

SUPREME COURT OF THE UNITED STATES.

No. 506.

WILLIAM MORAN AND ROWLAND HOWES NOBLE, PLAINTIFFS IN ERROR,

vs.

JOHN G. PRATHER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

INDEX.

	Original.	Print.
Petition	1	1
Document annexed to petition	3	3
Citation to R. H. Noble	10	4
Marshal's return	12	4
Citation to William Moran	12	4
Marshal's return	13	5
Alias citation to William Moran	14	5
Marshal's return	15	5
Exception	16	6
Hearing and submission of exception	17	6
Order: Exception dismissed	18	6
Answer of R. H. Noble	18	7
Answer of William Moran	19	7
Motion and affidavit for commission	19	7
Commission for plaintiff	21	8
Interrogatories-in-chief to Thorwegan	22	8
Interrogatories-in-chief to John G. Prather	25	9
Cross-interrogatories to William H. Thorwegan	29	10
Cross-interrogatories to J. G. Prather	31	11
Answers to interrogatories	33	11
Answers of J. G. Prather	34	12
Testimony of W. H. Thorwegan	51	17
Document "A"	58	19
Document "B"	59	20
Hearing and continuance of cause	60	20
Verdict and judgment	61	21
Bill of exceptions of defendants	62	21

	Original.	Print.
Bill of exceptions of defendants	64	22
Rule for a new trial	71	24
Rule for a new trial	73	25
Order: Rule for a new trial dismissed	76	26
Final judgment	77	26
Petition for writ of error	78	27
Order allowing writ of error	79	27
Rule taken by defendants to file two bills of exceptions	79	27
Order on rule	80	27
Bill of exceptions of defendants, marked "W"	80	28
Order as to the bond	83	28
Bond for writ of error	83	29
Justifying sureties on the bond	85	29
Clerk's certificate	88	30
Writ of error	89	31
Citation	90	31

1 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

No. 6785.

JOHN G. PRATHER
vs.
MORAN AND NOBLE.

Petition.—Filed June 25th, 1872.

To the hon. the judges of the circuit court of the United States for the fifth judicial circuit and district of Louisiana.

The petition of John G. Prather, a citizen of the State of Missouri, and a citizen of the United States, and resident of St. Louis, Missouri, respectfully represents that R. H. Noble and William Moran, both of whom reside in the city of New Orleans, in the district aforesaid, and are citizens of the United States, formerly commercial partners, doing business in this city in the year 1869, under the firm-name and style of Moran & Noble, as merchants and boat-store men, are justly and truly, as a firm and in solido as in-
2 dividuals, indebted to your petitioner in the full sum of eleven hundred and thirty-nine $\frac{10}{100}$ dollars, and legal interest thereon from May 30th, 1871; and in the further sum of eleven hundred and twenty-seven $\frac{46}{100}$ dollars, and interest thereon from Nov. 30th, 1871, for this, to wit, that heretofore, to wit: petitioner, together with one William H. Thorwegan and others, whose names will be proven at the trial of this cause, were, at the times the debts hereinafter spoken of originated, commercial partners in the use and navigation of the steamboat called the Bart Able, enrolled at this port and engaged in carrying freight and passengers for hire; that on the 25th day of September, 1868, said William R. Thorwegan sold all his interest in said steamboat to your petitioner, and to one other person, his interest being six thirty-seconds of said steamboat, and your petitioner then bought of him three thirty-seconds, and the other party three thirty-seconds, all of which will appear from a certified copy of said sale, to
3 be produced at the trial; that at the time of said sale, and as a part of the consideration for said sale, petitioner did bind and obligate himself to hold said Thorwegan harmless and free from all debts of the st'r "Bart Able" and owners, existing against her at the date of said sale, and from any liability therefor, and to re-imburse him for any and all debts then existing that he might be compelled to pay on account of his having been an owner of said steamboat. That subsequently to this, petitioner, being the owner of $\frac{17}{32}$ (seventeen thirty-seconds) of said steamboat, did, on the 21st day of September, 1869, sell all of his said interest in said steamboat to Mrs. Mary F. Barker, for the sum of six thousand dollars; all of which will appear from a certified copy of the bill of sale to be produced at the trial hereof; that the said steamboat was a very valuable and good steamboat, worth more than fifty thousand dollars, and as an inducement for said sale at said price of six thousand dollars the said Mrs. Mary F. Barker was to assume and pay all the debts exist-
4 ing against said steamboat at that time, and was to protect said

petitioner from the payment of same fully and in every way; but that in order to be sure of this protection for same, and not relying on the ability of the said vendee to do this, said petitioner required other and better security against the existing debts of said boat, and wished and demanded responsible persons to sign a bond for his aforesaid protection against the said debts of said boat; that as an inducement to him to make said sale, and as a part of the consideration of same, the defendants, then a commercial firm engaged in the boat-store and grocery business, did agree to give him an indemnity bond against said debts. And thereupon, on the 20th day of September, 1869, the day previous to the said sale, being drawn up, they bound themselves and their heirs in solido to defend and save the said petitioner free and harmless from any and all claims and demands that may arise or be brought against said steamboat, excepting the
5 claims of certain specified persons, to wit, Moran and Noble, J. S. Simonds, McCloskey, Mason & Co., T. R. Thedly, Jno. Wilson & Co., D. C. McCan, Brady & Palmer, who had already released said Prather from liability, and said Moran and Noble then signed said obligation and delivered the same to said petitioner, who, on the faith of same, made the sale aforesaid, at the aforesaid small price. Said bond, or a copy of same, is hereto attached for reference, and as a part hereof; that subsequently to this a judgment was rendered in the supreme court of L'a, on appeal from the 4th district court for the parish of Orleans, of the suit of Jno. A. Stevenson vs. Jno. G. Prather et als., owners of the st'r Bart Able, No. 21398 of said 4th district c't, against the owners of the Bart Able, who was at the time the cause of action accrued, owners of said boat, and among said defendants in judgment were petitioner and W. H. Thorwegan; that the debt sued on was a debt of the boat and owners, arising while Thorwegan was a part
6 owner, and while Prather, petitioner, was a part owner, and for which they were condemned in solido; that an execution issued on said judgment, and said Thorwegan was compelled to pay same, together with the interest and costs, amounting to the sum of eleven hundred and thirty-nine $\frac{10}{100}$ dollars, which sum he paid on the 30th day of May, 1871; that subsequently a judgment was rendered in suit of D. & J. D. Edwards vs. W. C. Harrison et als., owners of the st'r b't Bart Able, in suit No. 21955 of the docket of said 4th district court, against the owners of the st'r b't Bart Able, for the sum of eleven hundred and twenty-seven $\frac{46}{100}$ dollars, including interest and costs; that William H. Thorwegan was one of the owners of said steamboat at the time the debt accrued, and the debt was a debt of the boat and owners, and was one of the defendants agains whom said judgment was rendered, and petitioner was also an owner at the time and condemned by same judgment in solido with said Thorwegan et als.; that an execution
7 issued on said judgment, and said Thorwegan was compelled to pay said judgment, interest, and costs, which he did pay to the sheriff of the parish of Orleans on the 30th day of November, 1871; all of which will more fully appear from the records of said suits; that thereupon said Thorwegan demanded of petitioner that he should repay him said sums so paid out by him on said executions, in accordance with his obligation to indemnify him as aforesaid; and said John G. Prather, then at St. Louis, Mo., did repay to said William H. Thorwegan said sums of money and interest thereon, up to about January 1st, 1872, when he paid him as aforesaid; that these debts which he has paid to said Thorwegan were debts of the st'r Bart Able, and were claims and demands that arose and were brought against the st'r Bart

Able, and were existing prior to the 20th day of September, 1869, and were embraced under the said indemnity obligation of Moran and
8 Noble aforesaid; that petitioner was obliged to pay same, and that, under the obligation of said Moran and Noble, they are bound to defend and save him free and harmless from said debts; that he could not avoid paying the same; that he did pay same, and has demanded of said Moran and Noble that they should pay him back said sums, and interest thereon as aforesaid, and they have and utterly do refuse to pay him the said sums, or any part thereof, and that the whole of said sums, with the interest thereon as aforesaid, is yet due, owing, and unpaid to him by said Moran and Noble and the individual members of said firm in solido, said firm having since been dissolved.

Whereupon he prays that said R. H. Noble and William Moran be severally cited to answer this petition, and that they be condemned as a firm and in solido as individuals, to pay to petitioner the aforesaid sums of ($1,139.10,) eleven hundred and thirty-nine 10, and in-
9 terest on same from May 30th, 1871, and to pay him the further sum of ($1,127.46) eleven hundred and twenty-seven $\frac{46}{100}$ dollars, and interest thereon from Nov. 30th, 1871, till paid, and for all costs, and for general relief.

(Signed) GIVEN CAMPBELL.

Document annexed to petition.—Filed June 25th, 1872.

NEW ORLEANS, *Sept. 20th*, 1869.

We, the undersigned, creditors of the str. boat Bart Able, do hereby agree to release Jno. G. Prather, of St. Louis, from all indebtedness due us by the stm. "Bart Able," so far as the said Jno. G. Prather is concerned.

(Signed) MORAN & NOBLE.
(") J. S. SIMONDS.
(") McCLOSKY, MASON & CO.
(") Per pro JNO. HENNESSY.
(") T. R. MEDLEY.
(") JNO. WILSON & CO.
(") D. C. McCAN.
(") BRADY & PALMER.

NEW ORLEANS, *September 20th*, 1869.

We, the undersigned, of the city and State aforesaid, do hereby bind ourselves and our heirs, in solido, to defend and save the said Jno. G. Prather, of St. Louis, State of Missouri, seventeen thirty-seconds
10 owner of the steamboat "Bart Able," free and harmless of any and all claims and demands that may arise or be brought against said steamboat, excepting those above signed.

(Signed) MORAN & NOBLE.

STATE OF LOUISIANA,
Parish of Orleans:

I, the undersigned, a notary public in and for the parish aforesaid, duly commissioned and sworn, do hereby certify the above and foregoing to be a true and correct copy of the original, presented to me this day for identification.

Witness my hand and seal of office, at New Orleans, Sept'r 21st, A. D. 1869.

[SEAL.] (Signed) J. MORRIS DAY,
Not. Pub.

[5-cent int.-rev. stamp cancelled.]

Citation to R. H. Noble.

JOHN G. PRATHER
vs.
MORAN & NOBLE. } No. 6785.

The President of the United States of America, to the marshal of the district of Louisiana, greeting:

11 You are hereby commanded to summons R. H. Noble individually and as member of the late firm of Moran and Noble, and a citizen of the State of Louisiana, to comply with the demand of John G. Prather, a citizen of the State of Missouri, contained in the petition of which a copy accompanies this citation; or to deliver his answer to the same in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after service hereof, or judgment will be rendered against him by default, which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held; and that you make due return hereof on the first Monday of July, 1872.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 25th day of June, A. D. one thousand eight hundred & seventy-two, & of the Independence of the U. S. of America the 96th year.

[SEAL.] (Signed) F. A. WOOLFLEY, *Clerk.*

12 *Marshal's return.*

Received June 26th, 1872, by the U. S. marshal, and on the 29th day of same month and year served a copy of within citation and accompanying petition on R. H. Noble, named herein, by handing the same to him in person.

New Orleans, June 29th, 1872.

(Signed) S. W. REED,
D'y U. S.

Citation to William Moran.

JOHN G. PRATHER
vs.
MORAN & NOBLE. } No. 6785.

The President of the United States of America to the marshal of the district of Louisiana, greeting:

You are hereby commanded to summon William Moran individually and as member of the late firm of Moran and Noble, and a citizen of the State of Louisiana, to comply with the demand of John G. Prather, a citizen of the State of Missouri, contained *contained* in the petition of which a copy accompanies this citation; or to deliver his
13 answer to the same in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after service hereof, or judgment will be rendered against him by default, which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held; and that you make due return hereof on the first Monday of July, 1872.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 25th day of June, A. D. one thousand eight hundred and seventy-two, and of the Independence of the United States of America the 96th year.

(Signed) F. A. WOOLFLEY,
Clerk.

Marshal's return.

Received June 26th, 1872, by the U. S. marshal, and, after a dil-
14 igent search and enquiry, W'm Moran, named herein, could not be found, he being absent from the State.

New Orleans, July 1st, 1872.

(Signed) S. W. REED,
D'y U. S. Marshal.

Alias citation to W'm Moran.

JOHN G. PRATHER
vs.
MORAN & NOBLE. } No. 6785.

The President of the United States of America, greeting:

You are hereby commanded, as you have heretofore been, to summon William Moran individually and as member of the late firm of Moran and Noble, a citizen of the State of Louisiana, to comply with the demand of John G. Prather, a citizen of the State of Missouri, contained in the petition of which a copy accompanies this alias citation, or to deliver his answer to the same in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after service
15 hereof, or judgment will be rendered against him by default, which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held; and that you make due return hereof on the first Monday of November, 1872.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 2d day of July, A. D. one thousand eight hundred and seventy-two, and of the Independence of the United States of America the 96th year.

[SEAL.] (Signed) F. A. WOOLFLEY,
Clerk.

Marshal's return.

Received July 2d, 1872, by the U. S. marshal, and on the 5th day of September, of same year, served a copy of within citation and accompanying petition on W'm Moran, named herein, by handing the same to him in person at his domicile, corner 1st and Carondelet st's.

New Orleans, Sept'r, 5th, 1872.

(Signed) S. W. REED,
D'y U. S. Marshal.

16 *Exception.—Filed Oct. 11th, 1872.*

United States circuit court.

JOHN G. PRATHER
vs.
MORAN & NOBLE. } No. 6785.

Now comes W'm Moran and R. H. Noble, defendants in the above-entitled cause, into court, and without admitting any of the allegations contained in plaintiff's petition, they except, to this suit on the following grounds:

1st. The petition does not set forth the names of the persons who were the owners of the st'r Bart Able.

2d. That the act of sale of said boat from Thorwegan to the plaintiff in this suit, and referred to in said petition, has not been annexed thereto, and appearers are desirous of oyer thereof.

3rd. That the act of sale of said boat from plaintiff to Mary F. Barker, alleged and set up by plaintiff, has not been annexed to his petition, and appearers are desirous of oyer thereof.

4th. That appearers are desirous of oyer of the original bond alleged to have been signed by them, a pretended copy of which
17 has been annexed to the plaintiff's petition.

5th. That the petition filed in this cause sets forth no cause of action against appearers.

Wherefore appearers pray that this exception be maintained and plaintiff's suit dismissed at his costs.

(Signed) BENTINCK EGAN,
Att'y.

Hearing and submission of exception.—Extract from minutes November term, 1872.

NEW ORLEANS, *January 10th,* 1873.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, district judge.

JNO. G. PRATHER
vs.
MORAN & NOBLE. } No. 6785.

The exception taken by def'd'ts was called—G. Campbell for pl'ff; B Egan for defendants—and after hearing the pleadings and counsel the court took time to consider.

Order, exception dismissed.—Extract from minutes Jan'y 13th, 1873.

18 JOHN G. PRATHER
vs.
MORAN & NOBLE. } No. 6785.

The court considering the exception frivolous, & interposed for delay only, ordered that the same be dismissed with costs.

Answer of R. H. Noble.—Filed January 14th, 1873.

U. S. circuit court.

JOHN G. PRATHER
vs.
MORAN & NOBLE.

Now comes R. H. Noble, one of the def'ts in the above cause, into court, and reserving all his rights to the exception heretofore filed, he pleads a general denial to all and singular the allegations contained in plaintiff's petition.

Wherefore he prays that there be judgment in his favor, and against plaintiff, with costs.

(Signed) BENTINCK EGAN,
Att'y for R. H. Noble.

19 *Answer of William Moran.—Filed January 14th, 1873.*

U. S. circuit court.

JOHN G. PRATHER
vs.
MORAN & NOBLE.

Now comes W'm Moran, one of the defendants in the above cause, into court, and reserving all his rights to the exceptions heretofore filed, he pleads a general denial to all and singular the allegations contained in plaintiff's petition.

Wherefore he prays that there be judgment in his favor, and against plaintiff, with costs.

(Signed) BENTINCK EGAN, *Att'y.*

Motion and affidavit for commission.—Filed Feb'y 11th, 1873.

U. S. circuit court, dist. of L'a.

JOHN G. PRATHER
vs.
MORAN & NOBLE. No. 6785.

On motion of Given Campbell, att'y for plaintiff, and on suggesting to the court the accompanying affidavit:

20 Ordered, That a commission do issue from the court in this cause, directed to any United States commissioner residing in the city of Saint Louis, and State of Missouri, to examine and take the depositions of John G. Prather and William H. Thorwegan, & others, witnesses for plaintiff residing in the State of Missouri, and that a delay of thirty days be allowed for its execution and return.

Affidavit.

Given Campbell, sworn, says he is the att'y for John G. Prather, the plaintiff, who is absent from the State, and that he is informed and believes that John G. Prather and William H. Thorwegan, who reside in St. Louis, Missouri, are material witnesses for the plaintiff in this cause.

(Signed) GIVEN CAMPBELL.

Sworn to and subscribed before me this 11th February, 1873.
(Signed) K. LOEW, *U. S. C.*

Order.

Let a commission issue as prayed for, Feb'y 11th, 1873.
(Signed) E. H. DURELL, *Judge.*

21 *Commission for plaintiff.—Issued Feb'y 11th, 1873, returned and filed February 28th, 1873.*

Circuit court of the United States for the fifth judicial circuit, holding sessions in and for the district of Louisiana.

To any United States commissioner residing in Saint Louis, Mo.:

Know ye that, reposing special trust and confidence in your integrity and ability, we hereby authorize and require you that you call and cause to come before you William H. Thorwegan and John G. Prather and others, and them duly examine on the annexed interrogatories, on oath, touching and concerning certain matters and things in a case now depending in the said court, wherein John G. Prather is plaintiff and Moran and Noble are defendants; and the same examination, so taken and reduced to writing, you certify under your hand and seal, and send enclosed to this court, without delay, to be read in evidence on the trial of said cause, and send also this writ.

Witness the honorable Salmon P. Chase, Chief Justice of the
22 Supreme Court of the United States, at the city of New Orleans, this 11th day of February, anno Domini 1873, and the 97th year of the Independence of the United States of America.

(Signed) F. A. WOOLFLEY, *Clerk.*
By F. B. VINOT, *D'y Clerk.*

Interrogatories annexed to commission.

U. S. circuit court for Louisiana.

JOHN G. PRATHER *vs.* MORAN & NOBLE. } No. 6785.

Interrogatories to be propounded to William H. Thorwegan and John G Prather, witnesses, residing at St. Louis, Missouri, whose answers' under oath, are to be used on behalf of plaintiff in aforesaid title at the trial thereof.

Interrogatories to be propounded to William H. Thorwegan.

Interrogatory first. Where do you reside, and what is your age and occupation, and are you acquainted with the parties to this suit? If so, state how long you have known them.

23 Interrogatory second. Were you ever an owner of the steamboat Bart Able? If you say you were, state when you first became an owner of her, and how much you owned of her, and whether you are now an owner; and if you say you are not an owner, state when you parted with your interest in her.

Interrogatory third. If you have stated that you sold your interest in the Bart Able, and have stated when you sold, also state to whom you sold your interest.

Interrogatory fourth. State whether or not, at the time you sold your interest in said boat, you received any guarantee from any one to the debts existing against said boat, if any did exist; if you say there was such a guarantee, state whether the same was in writing, or whether it was a verbal guarantee; if you say it was in writing, attach the original, and if you cannot do that, then attach a certified copy and make it a part of your deposition; if it was not in writing, then state
24 what the guarantee was, and by whom made, and when made, and all about it.

Interrogatory fifth. At the time you sold your interest, as aforesaid, in said steamboat, state whether she or her owners, in their characters as owners of that boat, owed any debt; and if you say they did, state how you know.

Interrogatory sixth. State whether or not, since you sold your interest in said steamboat, you have ever been called on to pay any debts contracted by said boat and owners while you were an owner; if you say you have been so called on, state fully what debts they were, when contracted, and where contracted, and to whom contracted, and under what circumstances you paid the same, where you paid the same, and to whom you paid the same; and if you paid more than one debt, specify the number of said debts, and the amount of each; and if you have receipts for said payments, attach the same, and make them a part of your deposition.

25 Interrogatory seventh. State whether or not you have ever been re-imbursed for these payments made by you as aforesaid, for and on behalf of the old owners of the Bart Able. If you say you have been re-imbursed, state who repaid you, and when and where you were repaid, and whether you have been repaid in full, and under what, if any, obligation you were paid, stating fully all the circumstances connected with the transaction.

Interrogatory eighth. State any other facts within your knowledge which would be of advantage to the said plaintiff, John G. Prather, as fully as if specially interrogated.

(Signed) GIVEN CAMPBELL, *Att'y.*

Interrogatories to be answered by John G. Prather.

Interrogatory first. Are you the plaintiff in this case, and where do you reside, and are you acquainted with the defendants, Moran
26 & Noble; if so, how long have you known them?

Interrogatory second. Were you ever an owner of the steamboat Bart Able; if so, when did you become an owner in her, and what interest did you first own, and did you increase your interest in said boat, and when did you increase your said interest, and how did you increase it?

Interrogatory third. If you say you increased your interest, please state whether it was by purchase, and, if by purchase, from whom, and at what dates you purchased, and what prices you paid, and on what conditions you purchased, if there were any conditions.

Interrogatory fourth. If you have answered that you purchased any interest from William H. Thorwegan, state when you purchased, and what interest you purchased, and at what price, and whether there was any guaranty between you and Thorwegan as to outstanding debts due by the said boat and owners; if so, and if it was in writing, an-
27 nex the original if you can, and if you cannot do so, attach to your deposition a certified copy of same; if it was not in writing,

but was verbal, then state what said agreement and guarantee was, detailing said verbal contract.

Interrogatory fifth. Have you sold out your interest in the steamboat Bart Able? If you say you have, please state when you sold, and what price you obtained; also, state what was the value at that time of said steamboat, free from incumbrances.

Interrogatory sixth. Why did you sell your interest in said steamboat at such a price as that which you obtained?

Interrogatory seventh. State whether or not at the time you sold your interest in said steamboat, as aforesaid, she owed any debts, and what amount; also state whether or not any guarantee was required by you that you should not be held liable for the debts outstanding. If you say such a guarantee was required by you, then state whether any such guar-
28 antee was ever given, and by whom and in whose favor; and if you can, attach a copy of it or original.

Interrogatory eighth. State whether or not since the date you sold your interest you have ever been called on to pay any of the debts of said steamboat Bart Able and owners, existing and outstanding at the time you sold your interest in her as aforesaid; if you say you have, then state what debts they were, when contracted, where contracted, and who were owners, when same were contracted, and give the amounts and describe same.

Interrogatory ninth. State also to whom you paid said amounts, and if you say you have paid same to William H. Thorwegan, then also state why you paid them to him, and where you paid him, and if you say you paid him in pursuance of the guaranty aforesaid, state whether you took receipts from him for said payments; if you did, attach them; if you did not, state why you did not; state fully all the circumstances connected with said payments.

29 Interrogatory tenth. Have you ever been re-imbursed for said moneys so paid out *to* you, and have you ever demanded payment of said sums so paid by you from the defendants, Moran and Noble?

Interrogatory eleventh. Have they ever paid you the said sum so paid by you to Thorwegan; if not, how much do they owe you, and on what account are they so indebted to you?

Interrogatory twelfth. State any other facts within your knowledge which would be of advantage to the plaintiff.

(Signed) GIVEN CAMPBELL,
Att'y p. q.

Cross-interrogatories.

Reserving all objections to the interrogatories-in-chief propounded to W'm H. Thorwegan, and the answer to be given thereto, def'd'ts propound the following cross-interrogatories:

First interrogatory. If, in your answer to the second and third interrogatories-in-chief, you say you sold your interest in the st'r Bart
30 Able, please state to whom you sold it, when, where, and at what price, and on what terms of credit; was said sale in writing? If you say you then owned an interest in said boat, was your title in writing? If yea, where is it now?

Second int. If, in your answer to the fourth interrogatory-in-chief, you say that at the time you sold your interest in the st'r Bart Able, and received a guarantee against any debts, was said guarantee in writ-

ing; if yea, where is it now? Who had it last? If you undertake to attach a certified copy, please state who certified to it; were you present when it was certified; did you compare it with the original; who had the original last?

Third int. If, in your answer to the fifth interrogatory-in-chief, you say you have been called upon to pay debts since the boat was sold, please state whether the evidence of that fact is in writing; if yea, where is it? Were you not sued for said debts? If yea, in what court?
31 Did you not deny owing said debts and decline paying them?
(Signed) BENTINCK EGAN, *Att'y.*

Cross-interrogatories to be propounded to J. G. Prather, after reserving all legal objections to the interrogatories-in-chief and the answer to be given thereto, and specially objecting to any testimony in reference to the contents of written instruments, or any attempt to explain or contradict them.

First cross-interrogatory. If, in your answer to the second interrogatory-in-chief, you say you were an owner of the st'r Bart Able, please state whether the evidence of that fact is in writing; when, where, from whom you acquired that interest, and how much you paid for it?

Second cross-interrogatory. If, in your answer to the fourth interrogatory-in-chief, you say that you purchased any portion of the st'r Bart Able from W'm H. Thorwegan, state whether that fact is evidenced by any written act.
32 If you say that he gave you a written guarantee against outstanding debts due by said boat, was that guarantee in writing? If yea, where is said writing now; who had it last? If you undertake to annex what you call a certified copy of said writing, please state whether you compared it with the original; if yea, when and where did you compare it?

Third cross-interrogatory. If, in your answer to the fifth interrogatory, you say you sold out your interest in the st'r Bart Able, please state what price you received for it; was not the boat losing money at the time? has the boat ever been profitable? was not the said sale evidenced by a written act?

Fourth cross-interrogatory. If, in your answer to the seventh interrogatory-in-chief, you say that the boat owed debts, please state the amount of them, to whom were they owed, and were they not known and acknowledged by you? Was the guarantee you refer to in writing? If yea, where is it now?
33 (Signed) BENTINCK EGAN, *Att'y.*

CLERK'S OFFICE.

True copies of the originals on file.
New Orleans, February 8th, 1873.
[SEAL.] (Signed) F. B. VINOT,
D'y Clerk.

Answers to interrogatories.

UNITED STATES OF AMERICA,
Eastern District of Missouri:

Be it remembered that, on this 19th day of February, in the year of our Lord one thousand eight hundred and seventy-three, I, Lucien

Eaton, a commissioner, duly appointed by the circuit court of the United States for the said district of Missouri, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the
34 courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office, room 5, No. 203 Pine street, in the city of St. Louis, in the said district, in the State of Missouri, John G. Prather, a witness, to testify, and the truth to say, on the part and behalf of the plaintiff, in a certain suit or matter of controversy now depending and undetermined in the circuit court of the United States for the district of Louisiana, being the circuit court of the United States for the fifth judicial circuit, holding sessions in said district of Louisiana, wherein John G. Prather is plaintiff and Moran and Noble are defendants.

And the said JOHN G. PRATHER, being about the age of forty years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said John G. Prather, and he did thereupon depose and testify as follows, viz:

35 Int. 1st. Are you the plaintiff in this case, and where do you reside, and are you acquainted with the defendants Moran & Noble? If so, how long have you know them?

Answer. I am the plaintiff in the case; I reside in St. Louis; I know Moran and Noble. I have known them six (6) or seven (7) years. I knew Moran when he was in the house of E. Conery & Co., of New Orleans; that is as much as ten years ago; eight or nine years ago.

Int. 2d. Were you ever an owner of the steamboat Bart Able? If so, when did you first become an owner in her, and what interest did you first own, and did you increase your interest in said boat, and when did you increase your said interest, and how did you increase it?

Answer. I was a part owner of the steamer Bart Able, and was one of her building-owners. I owned while she was being built one-eighth ($\frac{1}{8}$) thereof; she was building in 1864; I think, in 1865, I bought one-
36 quarter ($\frac{1}{4}$) interest from Dan. Able. I afterwards purchased from William H. Thorwegan, on or about the 25th of September, 1868, three thirty-seconds, ($\frac{3}{32}$).

Int. 3rd. If you say you increased your interest, please say whether it was by purchase; and if by purchase, from whom, and at what dates you purchased, and what prices you paid, and on what conditions you purchased, if there were any conditions.

Answer. I increased my interest by purchase from Dan. Able of one-fourth ($\frac{1}{4}$) at the rate of sixty-four thousand (64,000) dollars for the whole boat, and William H. Thorwegan three thirty-seconds ($\frac{3}{32}$,) on or about, as I stated before, the 25th of September. The price I don't remember. The conditions with Thorwegan was that I was to guarantee him as well as Able against debts of said boat, as is usual in such cases.

Int. 4th. If you have answered that you purchased any interest from W'm H. Thorwegan, state when you purchased and what interest
37 you purchased, and at what price, & whether there was any guaranty

between you and Thorwegan as to outstanding debts due by the said boat and owners; if so, and if it was in writing, annex the original, if you can, and if you cannot do, attach to your deposition a certified copy of same; if it was not in writing, but was verbal, then state what said agreement and guarantee was, detailing said verbal contract.

Answer. I purchased from Thorwegan on or about September, 1868. I have no memoranda in my possession that will fix the date, but the bill of sale is recorded in the New Orleans custom-house, showing the exact date. The price I paid Thorwegan for his interest was a nominal one. He sold his interest for the purpose of getting rid of her liabilities, the boat's, and as a part of the consideration of the sale I agreed to hold him harmless and free from all debts of said boat that was in existence, and from any liabilities therefor, and I agreed to re-imburse him for any and all debts then existing that he might be com-
38 pelled to pay on account of his having been an owner of said boat. This agreement was verbal and never was reduced to writing.

Int. 5th. Have you sold out your interest in the steamboat Bart Able? If you say you have, please state when you sold, to whom you sold, and what interest you sold, and what price you obtained; also state what was the value at that time of said steamboat, free from encumbrances.

Answer. I have sold all the interest I had in the steamer Bart Able; all the interest I had in the steamer Bart Able was seventeen thirty-seconds, ($\frac{17}{32}$,) which I sold on or about the twenty-first (21st) day of September, 1869, to Mrs. Mary F. Barker, for the sum of six thousand (6,000) dollars. The sale was consummated in New Orleans by my agent or attorney, Jesse K. Bell, to whom I forwarded written authority to do so. The valuation of said boat, at the time of sale was, by the board of underwriters, forty-eight (48,000) thousand dollars, I
39 having my interest insured at that valuation, free from encumbrances, as will appear by the original policy herewith filed, marked Exhibit A. My interest was worth very much more than the sum I received.

Int. 6th. Why did you sell your interest in said steamboat at such a price as that which you obtained?

Answer. I sold my interest at so small a price to be relieved of the boat and her liabilities. That is to say, as a part of the consideration for said sale the purchaser, Mrs. Barker, agreed and guaranteed to pay all said boat's debts and liabilities.

Int. 7th. State whether or not at the time you sold your interest in said steamboat as aforesaid, she owed any debts, and what amount. Also state whether or not any guarantee was required by you that you should not be held liable for the debts then outstanding. If you say such a guarantee was required by you, then state whether any such
40 guarantee was ever given and by whom and in whose favor, and if you can attach a copy of it, or original.

Answer. When I made the sale aforesaid to Mrs. Barker, said steamboat owed debts, to what amount I cannot state; a guarantee was required and given that I should not be held liable for any of the then outstanding debts of the boat. Said guarantee was given by Moran and Noble, the defendants, except debts of parties named in the bond, who had released me from liability therefor. The original never having been in my possession, I cannot attach a copy.

Int. 8th. State whether or not since the date you sold your interest you have ever been called on to pay any of the debts of said steamboat Bart Able and owners existing and outstanding at the time you sold

your interest in her as aforesaid. If you say you have, then state what debts they were, when contracted, where contracted, and who were owners when same were contracted and give the amounts,
41 and describe same.

Answer. Since I made sale I have been called on to pay certain characters of debts of said steamer and owners, which debts existed and were outstanding when I sold to Mrs. Barker, as aforesaid. One debt I paid to Thorwegan, was in a case brought by John A. Steverson and others against myself and others, as owners of the "Bart Able," in the fourth district court for the parish of New Orleans, I believe. The amount paid in this case by Thorwegan was $1,139.10. This sum I paid to said Thorwegan. This case was for a settlement made by said Steverson and others, after a collision with a steamer on the Red River. The name of the boat colliding with the "Able" I cannot tell, nor do I remember the time of said collision. Another debt that was existing and outstanding against said boat at the time I made said sale to Mrs. Barker, & was paid by Thorwegan, amounted to $1,127.46, and was a judgment rendered in the fourth district court for the parish of New
42 Orleans, I believe, in the case of D. and J. D. Edwards against W. C. Harrison and others, as owners of the steamer "Bart Able." This debt accrued for repairs done on said boat, at New Orleans, by said D. & J. D. Edwards. The above-mentioned amounts were paid by the said Thorwegan to the sheriff at New Orleans, and to Thorwegan paid by me. I cannot now state who the owners were when said cases of action accrued, but I do know that Thorwegan and myself were owners at that time.

Int. 9th. State also to whom you paid said amounts; and if you say you paid them to W'm H. Thorwegan, then also state why you paid them to him, and where you paid him; and if you say you paid him in pursuance of the guarantee aforesaid, state whether you took receipts from him for said payments; if you did attach them; if you did not, state why you did not. State fully all the circumstances connected with said payments.

Answer. I paid said amounts, namely, $1,139.10 and $1,127.46, making $2,266.56, to William H. Thorwegan. I paid him said amounts in pursuance of my guarantee, aforesaid, given to him, wherein I
43 agreed to hold him free & harmless from all debts and liabilities of said boat, this being a part of the said debts and liabilities in my guarantee to him. At the time Thorwegan paid the claims he was indebted to me. He brought the receipts to me of the sheriff of New Orleans, showing that on the 30th of May, 1871, he had paid in the said Stephenson case the sum of $1,139.10, and that he had paid on the 30th of November, 1871, in the Edwards case, $1,127.46. These receipts he delivered to me, and I have them now in my possession. The amounts paid by him stand between us as offset to his indebtedness to me. This is the reason I didn't take receipts.

Int. 10th. Have you ever been re-imbursed for said moneys so paid paid out to you, and have you ever demanded payment of said sums so paid by you, from the defendants Moran & Noble?

Answer. I have never been re-imbursed for said moneys so paid out by me, through my attorney. I have demanded payment of said sums from the defendants, Moran & Noble.

44 Int. 11. Have they ever paid you the said sum so paid by you to Thorwegan? If not, how much do they owe you, and on what account are they so indebted to you?

Answer. The defendants have never paid to me any of the sums on

account of their guarantee aforesaid, on account of said debts so paid by me to Thorweigan. They, the defendants, owe me on account of the debts I paid to Thorweigan, under their guarantee, $2,266.66, with interest from the dates of Thorwegan's paying them.

Int. 12th. State any other facts within your knowledge which would be of advantage to the plaintiff.

Answer. I would state that my attorney, Jesse K. Bell, who made the last sale to Mrs. Barker, is familiar with all the facts of the sale and knows the reason of my taking six thousand dollars for so valuable property, which was, that they were to give me a guarantee against all liabilities, which was done by Moran and Noble, and a copy was sent to me, which I sent to my attorney.

45 Cross-interrogatories:

X-int. 1st. If in your answer to the second interrogatory-in-chief you say you were an owner of the steamer "Bart Able," please state whether the evidence of that fact is in writing, and when and where and from whom you acquired that interest, and how much you paid for it.

Answer. I was a building-owner of the steamer "Bart Able." I received my papers from the Government as owner, from being a building owner. I sold it to Mrs. Mary L. Barker, through my attorney. I have never seen the bill of sale at all, never having been in New Orleans since the sale was consummated. The sale was part time, I think, a thousand or fifteen hundred cash, and the balance in notes running from sixty (60) days to six (6) seven (7) or eight (8) months, perhaps. I have no recollection of the time they were made payable. The price was six thousand (6,000) dollars. The sale was in writing. The bill of sale, I suppose, is recorded in the custom-house in New Orleans. Of course,

46 I had a title in writing from the various parties I had purchased from. The title acquired from Thorwegan is recorded in the custom-house in New Orleans, and the one from Able is recorded in the custom-house, St. Louis.

X-int. 2. If in your answer to the fourth interrogatory-in-chief you say that you purchased any portions of the steamer "Bart Able" from W'm H. Thorwegan, state whether that fact is evidenced by any written act. If you say that he gave you a written guarantee against outstanding debts due by said boat, was that guarantee in writing? If yea, where is said writing now? Who had it last? If you undertake to annex what you call a certified copy of said writing, please state whether you compared it with the original. If yea, when and where did you compare it?

Answer. The purchase from Thorweigan is recorded in New Orleans, in the custom-house. I gave him a verbal guarantee against all liabilities and indebtedness to the boat. No written one, for the reason

47 that he and I were partners, and had been for many years, and was for a long time afterwards, and we did not require written guarantees between us, but it was distinctly understood that he sold his interest for the purpose of getting rid of her liabilities, as he was dissatisfied with the management of the boat, and, I with the other parties purchasing at the same time Thorwegan's interest, were to hold him harmless.

X-Int. 3rd. If, in your answer to the fifth interrogatory you say you sold out your interest in the steamer "Bart Able," please state what price you received for it. Was not that boat losing money at the time? Has the boat ever been profitable? Was not the said sale evidenced by a written act?

Answer. The said sale was consummated through my attorney, Jesse K. Bell. I am not able to state whether the boat was making money or losing money at the time, as I am in St. Louis, and she was
48 managed by other parties in New Orleans. I never made any money out of the boat, I know.

X-int'g. 4th. If, in your answer to the seventh interrogatory-in-chief, you say that the boat owed debts, please state the amount of them. To whom were they owed, and were they not known and acknowledged by you? Was the guarantee you refer to in writing; if yea, where is it now?

Answer. The boat was indebted, but to what amount I am unable to state, nor to whom. The guarantee given to my attorney was in writing, and is now in possession of my lawyer in New Orleans.

(Signed) JNO. G. PRATHER.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, Lucien Eaton, a commissioner duly appointed by the circuit court of the United States for said district of Missouri, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February, 20th, 1812, and the act of Con-
49 gress entitled "An act in addition to an act, entitled An act for the more convenient taking of affidavits in bail and civil causes depending in the courts of the United States," passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, that the witness is material and necessary in the cause in the caption of said deposition named, and that he resides at St. Louis, Missouri, more than one hundred miles distant from the place of trial of said cause.

I further certify that no notification of the time and place of taking the said deposition signed by me was made out and served on the defendants to be present at the taking of the deposition, and to put interrogatories if he or they might think fit, because the same was taken on interrogatories by virtue of the annexed commission.

I further certify that on the 19th day of February, in the year of our Lord one thousand eight hundred and seventy-three, I was attended by the witness, who was of sound mind and lawful age, and the witness
50 was by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, and the deposition was *for* me reduced to writing in the presence of the witness, and from his statements, and after carefully reading the same to the witness, he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of mailing the same with my own hand, post-paid at St. Louis, addressed to the court for which the same was taken.

And I do further certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof I have hereunto set my hand this nineteenth day of February, in the year of our Lord one thousand eight hundred and seventy-three.

(Signed) LUCIEN EATON,
Commissioner.

51 *Testimony—Filed February 28th, '73.*

U. S. circuit court, 5th circuit and district of Louisiana.

JNO. G. PRATHER *vs.* MORAN AND NOBLE. } No. 6785.

Testimony for plaintiff taken before F. B. Vinot, U. S. commissioner, this 28th February, 1873, in presence of G. Campbell for pl'ff and B. Egan for def'ts.

W'M H. THORWEGAN, being first duly sworn, says:

Am over 21 years of age; reside in St. Louis, Mo.; am acquainted with the plaintiff; can't say that I am acquainted with the def'ts; was an owner of the st. b't Bart Able; first became an owner of her when she was first built; don't remember the year; couldn't say how much, but think I owned $\frac{3}{16}$ths of her, or $\frac{6}{32}$ds; sold out in St. Louis before 1869, I think. I sold to Jno. G. Prather and W'm C. Harrison. I think they divided it together. I think I got $2,800 for my interest in the boat. I got a verbal guarantee against all existing liabilities of the boat. Jno. G. Prather was the guarantor. At the time I sold out I think the

52 boat was heavily in debt. Don't recollect the amount. The reason I took such a small consideration was because I didn't take much interest in the boat, and the other owners paid no attention to my suggestions, and, also, from the fact that she was heavily indebted at the time.

It was the understanding when I sold out, that I was to be guaranteed from all existing liabilities against the boat. Said boat cost from 100 to 110 thousand dollars. She was not a new boat nor an old boat. I think she was built in 1864.

I think when I sold out, the boat owed some money to Jno. A. Stevenson, but don't know whether she owed anything to D. & J. D. Edwards, but know they got a judgment against me as a part owner of the st'r Bart Able, and forced me to pay their judgment.

I paid a judgment in favor of both of these parties, Stevenson and the Edwards, against myself and the other owners of the Bart Able.

My boat, the Great Republic, was seized by the sheriff under

53 executions issued in both of the cases above named, and the papers now marked A & B are the sheriff's receipts given to me at the time I paid the said judgments. I paid the amounts mentioned in those receipts.

In suit of D. & J. D. Edwards I paid $1,127.48, and in the suit of Stevenson $1,139.10.

I suppose the dates in the receipts are the correct dates at which I paid these amounts.

Q. State whether or not you have been re-imbursed for the payments made by you for or on behalf of the old owners of the st'r Bart Able, as aforesaid.

A. Yes; Mr. Jno. G. Prather paid me. He repaid me in this way: I owed him $1,500 at the time. I afterwards bought supplies from him, and gave him credit until the debt was extinguished. He has fully paid me that amount of money. I think he had paid me before this suit was filed, the 25th June, 1872. Jno. G. Prather had paid me in full before the institution of this suit; am certain of that.

(Mr. Egan, for def'ts, objects to all of above testimony so far as

54 it relates to judgments, written bills of sale, or anything that can be proven by documentary evidence, on the ground that those documents are the best evidence.)

Cross ex.:

The st'r Bart Able was built in Louisville, Ky. I was a part owner when she was being built. Don't remember the year she was built. Don't know exactly, but think she cost $77,000 when she was first built. She was first built for a freight-boat, but afterwards we put a cabin on her, and furniture which cost pretty near $40,000, to fit her for the Red River trade. At the time she was built it cost more to build a boat than in 1869. A well-built boat will last from 8 to 10 years. Don't know how fast a steamboat depreciate'. Don't remember. Don't think I transferred my interest in writing. I afterwards gave him a bill of sale. When I first told Prather what I'll take for my interest, it was verbal; but when I transferred my interest it was in writing. I might have given Prather my power of att'y to sell my interest. Don't recollect.

55 Don't know the date of the sale. The sale was made in St. Louis. Prather did not give me a receipt when I settle', nor did I give him any. Prather was owing me and I was owing him, & no paper passed between us. I owed him $1,500. I held no note or obligation for that; I don't think that I held any. I suppose that he borrowed $5,000 from me, and I borrowed as much from him without any paper ever having passed between us at any time.

Prather is in the wholesale liquor business in S't Louis, Mo. He supplies steamboat-bars principally.

Don't know what I owed him for liquors on 25th June, '72. I might have been in debt with him at that time; I think I am at present; am not positive.

I own the bars on the Keokuk packet line, and they are constantly buying liquors from him.

Q. Can you state positively whether you owed Jno. G. Prather any amount on the 25th of June, 1872; and, if so, what amount?

56 A. Could not say what amount it is; more than likely I was in his debt.

Prather presents me accounts at times. The last he presented me was last fall or some time during the winter, when the boats were all laid up. Has not the a/c on me; think I have it in S't Louis. Think I am in debt with him now.

Don't remember how much I owed him as shown by that last account. I know it was not $1,000.

The 2 judgments mentioned in my direct examination were not credited in that last account.

Don't remember if they were credited in a/c of Jno. G. Prather a ainst me. I think Jno. G. Prather has a partner in business; only one; don't know his name; know the man; I now recollect his name is White. Don't know how long he has been his partner. Was one of the def'd'ts in the 2 suits I stated above I have paid.

I denied any liabilities for these debts.

57 The suits were not brought against me before I sold my interest in the boat that I ever heard of. They were brought against me after I sold my interest in the boat. Don't know of any suit that was brought against me before I sold my interest. Don't remember whether I had any counsel in these suits or not.

Don't know where I was in 1864; don't recollect; my home has always been in S't Louis.

Redirect:

Don't know the dates when these two suits were brought against the owners of the s't b't Bart Able. Therefore I don't know whether I had sold my interest at the time or not.

Don't know whether any body was employed to defend the suits, as I took very little interest in the business of the boat, and the other owners never consulted me.

(Signed) W'M H. THORWEGAN.

Sworn to and subscribed before me this 28th day of February, A. D. 1873.

[SEAL.] (Signed) F. B. VINOT,
U. S. Commissioner.

58 *Documents A and B.—Filed February 28th, 1873.*

A.

SHERIFF'S OFFICE—PARISH OF ORLEANS.

State of Louisiana, 4th district court for the parish of Orleans.

JOHN A. STEVENSON, J. W. FEE, SUBROGED, *vs.* JNO. G. PRATHER. } No. 21398.

Claim by writ of fi. fa	$854 40
Interest from 21st Feb'y, 1868, to 29th May, '71, @ 5%	139 90
	994 30
Clerk's costs	$71 95
Sheriff's costs, Avery	32 40
" " Maxwell	5 50
" " Summit	16 00
" " com'rs	14 95
May 30th, '71, add'l keeper's fee	4 00
	$1,139 10

Received, New Orleans, May 30th, 1871, of W'm H. Thorwegan, one of the defendants herein, the sum of eleven hundred and thirty-nine $\frac{10}{100}$ dollars, in full satisfaction of the above claim and costs.

(Signed) L. D. ARNOULT,
D'y Sheriff.

(Endorsed:) Offered by plaintiff May 15th, 1873.

(Signed) F. B. VINOT,
59 *D'y Clerk.*

(Endorsed:) Filed with testimony of W'm H. Thorwegan, Febr'y 28th, 1873.

(Signed) F. B. VINOT,
U. S. Comm'r.

B.

SHERIFF'S OFFICE, PARISH OF ORLEANS.

State of Louisiana, 4th district court for the parish of Orleans.

D. & J. D. EDWARDS
vs.
W. C. HARRISON & AL. } No.

Fi. fa. ag'st W. G. Thorwegan.

Claim by writ of fieri facias	829 41
Interest, @ 5% on $400, from 8th August, '68, to 30th Nov., '71, 3 years & 114 days	66 33
5% on $429 41 from 25th August, '68, to 30th Nov., '71, 3 years & 96 days	70 13
Damages	80 00
Clerk's costs paid by pl'ff	17 25
Sheriff's " " " "	6 20
	1,069 32
Clerk's costs	22 35
Clerk's costs supreme court	8 60
Sheriff's costs	9 50
Commission	15 69
	$1,125 46
	2 00
	$1,127 46

60 Received, New Orleans, Nov'r 30th, 1871, of W. G. Thorwegan, by hands of Bofinger and Pegram, agents, the sum of eleven hundred and twenty-seven $\frac{46}{100}$ doll's, in full satisfaction. Judgment, interest, & costs in the above case.

(Signed) ROB'T SWAIN,
D'y Sheriff.

(Endorsed:) Offered by plaintiff May 15th, 1873.
(Signed) F. B. VINOT, *D'y Clk.*

(Endorsed:) Filed with testimony of W'm H. Thorwegan, Febr'y 28th, 1873.
(Signed) F. B. VINOT,
U. S. Comm'r.

(Endorsed:) Filed with testimony February 28th, 1873.
(Signed) F. B. VINOT, *D'y Clk.*

Hearing and continuance of cause.—Extract from minutes.—April term, 1873.

NEW ORLEANS, *Wednesday, May 14th,* 1873.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, district judge.

J. G. PRATHER
vs.
MORAN AND NOBLE. } No. 6785.

This cause came up for trial—Given Campbell for plaintiff;
61 B. Egan and Collin and Levi for *for* defendants—when the following jurors were called and sworn to try the issue:

1. VICTOR DARENSBURG.
2. A. MARS.
3. W'M WEBER.
4. ED. FULTON.
5. THO'S MCGRUDER.
6. H'Y WEBER.
7. DONATIEN BROWN.
8. VOR EGANA.
9. J. ARMBRUSTER.
10. EM'L BLESSY.
11. NUMA GOTIS.
12. T. D. WHITMORE.

And the jury being complete, the trial proceeded, and after hearing the pleadings, it being now 3 p. m., the cause was adjourned till to-morrow at 11 a. m.

Verdict and judgment.—Extract from minutes May 15th, 1873.

J. G. PRATHER
vs.
MORAN & NOBLE. } No. 6785.

This cause was resumed, and after hearing further evidence and argument, and receiving a charge from the court, Emanuel Blessey was appointed foreman of the jury, and they retired to consider on their verdict.

After due deliberation they returned into court, and delivered the following verdict:

62 Judgment in favor of plaintiff, $2,266.56, and cost of court.

EMANUEL BLESSEY,
Foreman.

NEW ORLEANS, *May 15th*, 1873.

Whereupon it is ordered that the verdict be recorded.

Bill of exceptions of defendants.—Filed May 17th, 1873.

U. S. circuit court.

JOHN G. PRATHER
vs.
MORAN & NOBLE.

Be it remembered that on the trial of this cause, defendants William Moran and Roland H. Noble, through their respective counsel, tendered as witnesses on their behalf Edward Conery, R. H. Noble, Capt. George H. Kirk, and Capt. Geore L. Kouns, for the purpose of proving by said witnesses that they have been doing business in New Orleans with steamboats for many years past; that they are familiar with the custom among merchants and others in their dealing with steamboats in this city; that the word steamboat debts is a well-known term among steamboatmen and merchants in this city and others dealing with them, and that the meaning of that word is debts that bore a
63 lien and privilege on the boat for necessary supplies, materials,

repairs, and wages; and in the year 1869, and for some years before and after that date, it was confined to and existed but six months against a domestic vessel, like the Bart Able, from the date the debt accrued, according to the laws of this State, act of 1855. And that when a debt could not be enforced against the boat by any of the conservatory processes allowed by the laws of the State of Louisiana, it ceased to be a debt of the boat, though it might remain a debt of the owners. Which testimony being objected to by counsel for plaintiff, and the court having sustained said objection, and refused to permit it to go to the jury as evidence on the trial of the cause, to explaining the meaning of the words debts of the st'r "Bart Able," as contained in the bond referred to in pl'ff's petition, for which purpose def'ts had offered it.

Defendants took this their bill of exceptions to the ruling of the court, and pray that it may be signed, which is done accordingly.

(Signed) E. H. DURELL, *Judge.*

64 *Bill of exceptions of defendants—Filed May 17th, 1873.*

U. S. circuit court.

JOHN G. PRATHER
vs.
MORAN & NOBLE.

Be it remembered that on the trial of this cause, the jury being in their box in open court and ready to receive the charge of the court, and before they had retired to deliberate upon their verdict, the defendants, William Moran and Roland Harris Noble, through their respective counsel, requested the court through the presiding judge, the honorable E. H. Durell, to give the jury five charges which read as follows:

The law is that one member of a commercial firm has no authority to bind the firm by signing the firm-name to a bond executed for the benefit of third persons unless he has been especially authorized by his copartner to do so, or that his act in doing so has been ratified since it was done by his copartner, and in that event the parties would
65 only be liable each for his share, that is, one-half each where there are two, as solidority in obligations is never presumed, and commercial partners, though liable in solido, are so only in transactions connected with their commercial business. The party alleging this authority or ratification of this act must show it clearly and positively to your complete and entire satisfaction by competent evidence. It cannot be inferred and ought to be shown by written evidence.

2nd. If you find the evidence that the bond of indemnity referred to in plaintiff's petition, and bearing date 20th of September, 1869, was executed by defendants, or either of them, and which reads as follows, to wit:

NEW ORLEANS, LA., *September 20th*, 1869.

We, the undersigned, of the city of New Orleans, and State aforesaid, do hereby bind ourselves, and our heirs, in solido, to defend and save the said John G. Prather, of St. Louis, Missouri, seventeen thirty-seconds owner of the steamboat Bart Able, free and harmless of any and all claims and demands that may arise or be brought against said steamboat excepting those above signed.

(Signed) MORAN & NOBLE.

66 You will next enquire when the debts which plaintiff claims to have paid arose, or were brought against the steamboat Bart Able, and if you find from the evidence that those debts arose or were brought against the steamboat Bart Able previous to the date of the bond, (20th of September, 1869,) though paid afterwards, then defendants are liable, and your verdict will be in their favor.

2rd. That defendants in this cause are sureties and sought to be made liable as such. The law is that there are no presumptions against sureties; they can only be held to the precise terms of their obligation; their contract is to be construed strictly, and cannot be extended by implication beyond its express terms.

4th. In order to entitle plaintiff to recover in this cause, he must establish by competent evidence and to your satisfaction—

First. That the defendants or either of them signed the bond referred to in his petition.

Second. That he was legally liable for the debt he now seeks to recover.

Third. That he actually paid it, and,

67 Fourth. That the debt arose and was brought against the steamboat Bart Able since the date of the bond, the 20th of September, 1869. And if he fails in establishing any one of those four facts, the defendants are not liable, and your verdict must be in their favor.

5th. Legal agreements having the effect of law upon the parties, none but the parties can abrogate or modify them. The words of a contract are to be understood like those of a law in their common and usual signification; terms of art or technical phrases are to be interpreted according to their received meaning with those who profess the art or profession to which they belong. Now, all debts of the owners of a steamboat are not debts of the boat. In order to ascertain what are debts of the boat, you must examine the evidence, and ascertain from it what is understood by the words debts of the steamboat (Bart Able) as contained in the contract, for if the debts claimed in this suit were not such debts as could be enforced against the st'r Bart Able, they would not come within the term of the obligation or bond referred to in

68 plaintiff's petition, even though they should have arisen or been brought since the date of the bond, 20th of September, 1869. A claim against the boat is stale when the creditor has an opportunity to enforce it, and neglects to do so for a reasonable time, and the guide in courts of admirality is by analogy to the State law. In this State the debt against a steamboat is barred in six months; consequently this debt is not one that could be enforced against the st'r Bart Able, and they are not liable on the bond in suit, and you will find in their favor.

The first of which charges the court gave after striking out the last sentence "and ought to be shown by written evidence."

The second the court refused to give or any part of it.

The third the court gave without alteration or amendment.

The fourth the court refused to give and struck out entirely.

And the fifth the court gave in the following words: legal agreements having the effect of law upon the parties, none but the parties can abrogate or modify them; the words of a contract are to be

69 understood like those of a law in their common and usual signification; terms of art or technical phrases are to be interpreted according to their received meaning with those who profess the art or profession to which they belong.

Now, all debts of the owners of a steamboat are not debts of the boat. In order to ascertain what are debts of a boat, you must examine the

evidence, and ascertain from it what is understood by the words debts of the steamboat ("Bart Able") as contained in the contract, for if the debts claimed in this suit were not such debts as could be enforced against the st'r "Bart Able," then they are covered by the bond. A claim against a steamboat is stale when the creditor has an opportunity to enforce it, and neglected to do so for a reasonable time.

This charge being altered from that requested by counsel for def'ts by the court adding in the words, "then they are covered by the bond," and striking out the words "they would not come within the terms of the obligation or bond referred to in plaintiff's petition, even
70 thoug' they should have arisen or been brought since the date of the bond, the 20th of September, 1869;" and also the words "and the guide in courts of admiralty is by analogy to the State law. In this State the debt as against a steamboat is barred by six months, consequently this debt is not one that could be enforced against the st'r Bart Able. They are not liable on the bond in suit, and you will find in their favor."

And the court having refused to give said charges to the jury, then in their box, and before they had retired from the same, or the court-room, to consult upon their verdict, but gave them in charge to the jury as set forth above, the said defendants, W'm Moran and R. H. Noble, through their respective counsel then and there, and in presence of the jury, and before they had retired from their box or seats in the court-room to deliberate upon their verdict, excepted to the ruling of the court, refusing to give the charges above set forth and requested, and also to the alterations of those given by the court, and took this their bill of exceptions to the ruling of the court, and asked
71 that the same may be signed by the court, which is accordingly done.

(Signed) E. H. DURELL, *Judge.*

Rule taken for a new trial.—Extract from minutes & filed May 19th, 1873.

JNO. G. PRATHER
vs.
MORAN & NOBLE. } No. 6785.

On motion of Cotton and Levy, att'ys for W'm Moran, one of the defendants in the above cause, it is ordered by the court that plaintiff do show cause, on Saturday, 24th May, 1873, at 11 o'clock a. m., why a new trial should not be granted in the above cause, on the following grounds:

1st. Because the judgment and verdict of the jury is contrary to the law and the evidence.

2d. Because the jury disregarded the first charge given by the court to them in finding a verdict in favor of plaintiff against the defendants in solido, and the judgment is clearly erroneous in condemning
72 def'ts in solido, because if liable at all they are only so severally and not in solido.

3rd. Because the verdict and judgment are erroneous in this, that the bond bears date 20th of September, 1869, and was given to protect and save plaintiff free and harmless of any and all claims and demands that may arise or be brought against the st'r Bart Able, and the allegations contained in plaintiff's petition, as well as the evidence offered by him to support them, shows that the debt pl'ff seeks to recover arose

and was brought against four persons who were her owners at one time some years before the date of the bond; that the defendants are, if liable at all, only so as sureties; that their obligation must be strictly construed, and they can only be held to the precise terms of their obligation, and their obligation was not to protect or pay the debts of those four persons, but, according to the precise terms of their obligation, the claim and demands that may arise or be brought against the st'r Bart Able since the date of the bond, 20th of September, 1869, and that the debt claimed by plaintiff did not arise and were not
73 brought against the st'r Bart Able; consequently they did not come within the terms of the bond sued upon.

4th. Because the jury disregarded the third charge given by the court.

5th. Because plaintiff should have shown by written evidence that he was responsible for the debt, as the assumption or promise to pay the debt of a third person, must be shown by written evidence.

6th. Because has not shown that he ever paid the debt he seeks to recover; the testimony of Thorwegan, his own witness, on his cross-examination shows that it never has been paid.

Rule taken for a new trial.—Extract from minutes & filed May 19th, 1873.

JOHN G. PRATHER
vs. } 6785.
MORAN & NOBLE.

On motion of Bentinck Egan, att'y for R. H. Noble, one of the defendants in the above cause, it is ordered by the court that John G. Prather, plaintiff in the above cause, do show cause, on Saturday, 24th May, 1873, at 11 a. m., why a new trial should be granted in said cause on the following grounds:

74 1st. Because the verdict of the jury and judgment thereon is contrary to the law and the evidence.

2d. Because there was no evidence offered to show that the defendant R. H. Noble ever signed the bond referred to in the plaintiff's petition, and on which this suit was based, and his own testimony showed clearly and positively that he did not sign*ed* said bond, and knew nothing of it ever having been signed until some years after it had been signed, when it was shown to him in the 7th district court in this city, just previous to this suit having been brought.

3rd. Because the jury disregarded the first charge given by the court in finding a verdict in favor of the plaintiff and against the defendants in solido, and the judgment is clearly erroneous in condemning defendants in solido, because, even supposing the bond was signed by one member of the firm with the consent of the other, (which fact was not shown,) it would not bind them in solido, but only each for one-half, as the court has charged the jury.

75 3. Because the verdict and judgment are erroneous in this, that the bond bears date the 20th of September, 1869, and was given to protect and save the plaintiff John G. Prather, free and harmless of any and all claims and demand that may arise or be brought against the steamboat Bart Able, and the allegations contained in plaintiff's petition, as well as the testimony offered by plaintiff to support them, showed clearly and positively that the debt plaintiff seeks to recover arose and was brought, not against the st'r Bart Able, but

against four persons who were her owners so long previous to the date of the bond, and the defendants, if liable at all, are only so as sureties There obligation must be strictly construed, and they can only be held to the precise terms of their obligation, and to condemn them to pay the claim set up by plaintiff is not according to the precise terms of their obligation on the bond, as the debt sued for is not a debt that could be brought against the st'r Bart Able, which boat is now in the port of New Orleans, but a debt that arose and was brought
76 against four persons, whose names are shown in the records offered by plaintiff in evidence, many years before the date of the bond.

4th. Because the jury disregarded the third charge given by the court.

5th. Because the plaintiff failed to show that he was legally responsible for the debt; that fact, being the assumption or promise to pay the debt of a third person, should have been established by written evidence.

6th. Because the plaintiff failed to show that he ever paid the debt he now seeks to recover; the testimony of Capt. Thorwegan on this cross-examination would go to show that it never was paid.

Order rules for a new trial dismissed.—Extract from the minutes of May 27th, 1873.

JOHN G. PRATHER *vs.* MORAN & NOBLE. } No. 6785.

The rule for a new trial herein were called—G. Campbell for pl'ffs; B. Egan for def'dts, pl'ffs in rule—when, after hearing arguments,
77 ordered that the rules be dismissed and a new trial refused, with costs.

Final judgment from judgment docket.

Circuit court of the United States, fifth circuit and district of Louisiana, April term, 1873.

NEW ORLEANS, *Thursday, May 15th*, 1873.

Court met pursuant to adjournment. Present, Hon. E. H. Durell, dist. judge.

J. G. PRATHER *vs.* MORAN & NOBLE. } No. 6785.

By reason of the verdict, and in accordance therewith, it is ordered, adjudged, and decreed that John G. Prather do have and recover judgment against the defendants, R. H. Noble and W'm Moran, individually, and as members of the commercial firm of Moran and Noble, in solido, for the sum of twenty-two hundred and sixty-six $\frac{56}{100}$ dollars, and costs of suit.

Judgment rendered May 15th, 1873.

Judgment signed May 28th, 1873.

(Signed) E. H. DURELL, *Judge*.

78 *Petition and order for writ of error.—Filed June 2d, 1873.*

JNO. G. PRATHER
vs.
MORAN & NOBLE.

To the honorable the circuit court of the United States for the fifth circuit and district of Louisiana:

The petition of William Moran and Roland Harris Noble, defendants in the above cause, respectfully represent that petitioners are informed and believe that there is error to their prejudice in the final judgment rendered against them in the above cause, on the 15th of May, 1873, and signed on the 28th of May, 1873, and that they are aggrieved by said final judgment, and are desirous of taking a writ of error therefrom to the honorable Supreme Court of the United States with supercedeas.

Wherefore petitioners pray that they be allowed a writ of error from said final judgment, with supercedeas returnable in the honorable Supreme Court of the United States, on the 2d Monday of October, 1873, on giving bond conditioned according to law, in the sum of four
79 thousand eight hundred dollars, and that John G. Prather be cited to appear and answer said writ of error.

(Signed) BENTINCK EGAN, *Att'y.*
(Signed) COTTON & LEVY, *Att'ys.*

Order.

A writ of error to operate as a supercedeas is allowed in this cause, as prayed for, and, according to law, the plaintiffs in error giving bond in the sum of forty-eight hundred dollars, with surety, conditioned as the law directs, said writ being made returnable in the Supreme Court of the United States, 2d Monday of October, 1873.

June 2d, 1873.

(Signed) E. H. DURELL, *Judge.*

Rule taken by def'd'ts.—Extract from minutes June 4th, 1873.

JNO. G. PRATHER
vs. No. 6785.
MORAN & NOBLE.

On motion of B. Egan, att'y for R. H. Noble, one of def'd'ts in
80 the above cause, and of Cotton and Levy, att'y for W'm Moran, also one of the defendants, and on suggesting to the court that they have two bills of exception in this cause which have not been signed in consequence of objections made by counsel for plaintiff, it is ordered by the court that the plaintiff do show cause, on Saturday, 7th June, 1873, at 11 a. m., why said bills of exceptions should not be signed.

Order on rule.—Extract from minutes June 7th, 1873.

JNO. G. PRATHER
vs. No. 6785.
MORAN & NOBLE.

The rule taken on the 4th instant was called—B. Egan for mover;

G. Campbell for pl'ff—when, after hearing the parties, his honor signed the bill of exception, marked W, and refused to sign the other, marked X, which is objected to by pl'ff's counsel.

Bill of exceptions of def'ts, marked W.—Filed June 7th, 1873.

U. S. circuit court.

JNO. G. PRATHER
vs.
MORAN & NOBLE.

Be it remembered that on the trial of this cause, plaintiff, through his counsel, introduced Jesse K. Bell as a witness, who stated, in substance, when on the witness-stand and in presence of the jury, that he was the agent of the plaintiff in this cause at the time of the sale of the plaintiff's interest in the st'r Bart Able to Mrs. Mary F. Barker, on the 21st of September, 1869; that he made the sale on behalf of plaintiff; that the boat was then a very valuable vessel, and the interest of plaintiff in her was worth much more than the amount for which said interest was sold and set forth in the bill of sale from said John G. Prather to the said Mrs. Mary F. Barker, and it was understood at the time of said sale that the said Mrs. Mary F. Barker should assume and protect said plaintiff from all existing debts of said boat, and give a bond to that effect.

To the admission of which testimony W'm Moran and R. H. Noble,
82 through their respective counsel, objected, on the ground that the bill of sale of said boat was in writing; that if fixed the value of the interest of plaintiff in said st'r Bart Able at the time of said sale, and that parole evidence was not admissable to explain, vary, or control the written act of sale of said boat, nor as to what may have been said before at the time of making it, or since, C. C. 2256, (old ed.;) that the defendants in this cause were not parties to said contract or agreement in reference to the sale of said boat, and were not bound by any agreement or understaning between the said parties, in reference to the value of said boat, or the debts to be assumed; that this suit is against them alone, as sureties on the bond alleged to have been signed by them; that their liability, if liable at all, was stricti juris, and must be restrained within the precise terms of the contract, the bond sued upon.

All of which objections being overruled by the court, and said testimony admitted in evidence and to go to the jury then present in court, and in their places in the jury-box, the said def'ts, through their respective counsel, took this their bill of exceptions, to the ruling
83 of the court, and pray that the same may be signed, which is accordingly done.

(Signed) E. H. DURELL, *Judge.*

Order as to the bond.—Extract from the minutes June 20th, 1873.

J. G. PRATHER
vs.
MORAN & NOBLE. } No. 6785.

The attorney for the def'd'ts, moving the court to approve the sureties on the appeal-bond, ordered that the matter be referred to the clerk.

Bond for writ of error.—Filed June 20th, 1873.

Know all men by these presents that we, William Moran and Roland H. Noble, as principals, and Zacharie Bruenn, as sureties, are held and firmly bound unto John G. Prather in the full and just sum of forty-eight hundred dollars, to be paid to the said John G. Prather, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs,
84 executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 19th day of June, in the year of our Lord one thousand eight hundred and seventy-three.

Whereas, lately at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court, wherein John G. Prather was plaintiff and William Moran and Roland H. Noble defendants, judgment was rendered against the said William Moran and Roland H. Noble, defendants, and the said William Moran and Roland H. Noble having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said John G. Prather, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

Now, the condition of the above obligation is such, that if the
85 said William Moran and Roland H. Noble shall prosecute their writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Sig'd)	W'M MORAN.	[L. S.]
(do.)	R. H. NOBLE.	[L. S.]
(do.)	Z. BRUENN.	[L. S.]
(do.)	J. T. AYCOCK	

Sealed and delivered in the presence of—
(Signed) B. F. VINOT.

Approved June 23d, 1873.
(Signed) F. A. WOOLFLEY, *Clerk.*

UNITED STATES OF AMERICA,
District of Louisiana, ss:

Personally appeared before me, the undersigned, a United States commissioner in and for the district aforesaid, Zachary Bruenn, surety on the bond for a writ of error in the case of John G. Prather vs. Moran and Noble, No. 6785 of the docket of the U. S. circuit court, district of Louisiana, who, being duly sworn, deposes and says that he resides at No. 111 St. Mary street, in the city of New Orleans, La., and
86 is doing busi at No. 45 Poydras street, in said city; that he is worth the sum of forty-eight hundred dollars over and above his just debts and liabilities; that he owns real estate in his own right, situated in said city of New Orleans, at No. 111 St. Mary street, having 60 feet front on St. Mary street, with the buildings and improvements thereon; that the value of the same is about ($8,000.00,) eight thousand dollars; that the same is assessed at about eight thousand dollars, ($8,000.00;) that there are no debts, or liabilities, or incumbrances thereon; and that he is not tutor of any minors.

(Signed) Z. BRUENN.

Sworn to and subscribed before me this 20th June, 1873.
(Signed) F. A. WOOLFLEY,
U. S. Com'r.

UNITED STATES OF AMERICA,
District of Louisiana, ss:

Personally appeared before me, the undersigned, a United States commissioner in and for the district of Louisiana, Jordan T. Aycock, surety on the bond for a writ of error in the case of John
87 G. Prather vs. Moran and Noble, No. 6785 of the docket of the U. S. circuit court, district of Louisiana, who, being duly sworn, deposes and says that he resides in the city of New Orleans, La.; that he is worth the sum of forty-eight hundred dollars over and above his just debts and liabilities; that he owns real estate in his own right, situated in said city of New Orleans, on Louisiana avenue, between Live-Oak, or Constance, and Laurel streets, being lots Nos. 11 and 12, and portions of lots No. 17 and 18, with buildings and improvements thereon; that the value of the same is about five thousand dollars ($5,000.00;) that the same is assessed at about five thousand dollars ($5,000.00;) that there are no debts, liabilities, or incumbrances thereon; and that he is not tutor of any minors.
(Signed) J. T. AYCOCK.

Sworn to and subscribed before me this 19th June, 1873.
(Signed) F. A. WOOLFLEY,
U. S. Commissioner.

88 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 87 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of John G. Prather vs. Moran & Noble, No. 6785 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 6th day of September, A. D. 1873.
[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, E. H. Durell, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand at the city of New Orleans, in said district, this 6th day of September, A. D. 1873.

E. H. DURELL, *Judge.*

89 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between John G. Prather, plaintiff, and William Moran and Rowland Howes Noble, defendants, numbered 6785 on the docket of said court, a manifest error hath happened, to the great damage of the said William Moran and Rowland Howes Noble, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Nathan Clifford, associate justice of the said Supreme Court of the United States, this 2d day of June, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court
for the District of Louisiana.

(Indorsed:) United States circuit court. No. 6785. W'm Moran & Roland Howes Noble, plaintiffs in error, versus John G. Prather, defendant in error. Writ of error. Filed June 2d, 1873. F. B. Vinot, d'y cl'k.

90 THE UNITED STATES OF AMERICA,
District of Louisiana:

The President of the United States to John G. Prather, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein William Moran and Roland H. Noble are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan Clifford, associate justice of the Supreme Court of the United States, this 23d day of June, in the year of our Lord one thousand eight hundred and seventy-three.

E. H. DURELL, *Judge.*

91 (Indorsed:) United States circuit court. No. 6785. William Moran and Roland H. Noble, pl'ffs in error, vs. John G. Prather, defend't in error. Citation.

Marshal's return.

Received, June 25, '73, by the U. S. marshal, and on the 8th day of July, 1873, served a copy hereof on John G. Prather, defendant in error, by handing the same to Given Campbell, attorney for said Prather, in person in this city.

New Orleans, July 23, 1873.

S. W. REED,
D'y U. S. Marshal.

On this 23d day of July, 1873, personally came and appeared before me, the subscriber, S. W. Reed, a deputy marshal for the district of Louisiana, who being duly sworn, declared that on the 8th day of July, 1873, he served a copy of the within citation on the defendant in error, as stated in his official return thereon.

S. W. REED,
D'y U. S. Marshal.

Sworn to and subscribed before me this 23d day of July, 1873.

F. B. VINOT,
U. S. Comm'r.

(Indorsement on cover:) No. 506. William Moran and Rowland Howes Noble, plaintiff' in error, vs. John G. Prather. Louisiana C. C. U. S. Filed 7th October, 1873.

Supreme Court of the United States.

No. 215.—October Term, 1874.

William Moran and Rowland Howes Noble, Plaintiffs in Error, vs. John G. Prather. } In error to the Circuit Court of the District of Louisiana.

Brief of Defendant in Error.

This is an action brought by defendant in error, 25th June, 1872, on the following guarantee (p. 3):

"New Orleans, *Sept.* 20, 1869.

"We, the undersigned, of the city and state aforesaid, do hereby bind ourselves and our heirs, in solido, to defend and save the said John G. Prather, of St. Louis, State of Missouri, seventeen thirty-seconds owner of the steamboat 'Bart Able,' free and harmless of any and all claims and demands that may arise ~~to~~ be brought against or said steamboat, except that above signed.

"Moran & Noble." (p. 3.)

The paper "above signed," is as follows:

"New Orleans, *Sept.* 20*th*, 1869.

"We, the undersigned creditors of the Str. Bart Able, do hereby agree to release John G. Prather from all indebtedness due us by the Str. 'Bart Able,' so far as the said John G. Prather is concerned.

(Signed) "Moran & Noble, J. Simonds, McCloskey, Mason & Co., per John Hennessy, T. R. Medley, John Wilson & Co., D. C. McCaw, Brady & Palmer."

The petition states that at the date of said guarantee, the plaintiff owned seventeen thirty-second parts of said vessel, having been a part owner from the time the vessel was built, and having acquired three thirty-second parts thereof on the 25th day of September, 1868, of one Thorwegan, and having bound himself to said Thorwegan to hold him harmless against the debts of the boat then existing. That plaintiff then sold to Mrs. Barker, for the consideration of $6,000, her obligation to assume the existing debts of the boat and the defendant's guarantee, the boat being intrinsically worth $50,000. That afterwards judgments were obtained against the former owners of the boat for debts assumed by Mrs. Barker and guarantied by defendants; that Thorwegan was compelled to pay them, and plaintiff to refund to him, whereby the defendants became liable to plaintiff on their guarantee.

Exceptions to the petition were taken by the defendants; but having been overruled (p. 6), the defendants pleaded the general issue (p. 7). On 14th May, 1873 (p. 21), verdict and judgment for the plaintiff for $2,266.56.

The only questions which the exceptions of defendants present are—

1. Whether the guarantee applied to the debts mentioned in the petition, or only to such as were a lien upon the boat at the date of sale, or to those which accrued after the sale;

2. Whether, if the guarantee was signed by one partner, it was necessary to show his authority from the other partner to do so by written instrument; and,

3. Whether Bell's testimony as to the terms of sale to Mrs. Barker was admissible.

I. (1.) The first exception is in substance a demurrer to the petition, which was inadmissible at the trial. Advantage can only be taken of the insufficiency of a petition by demurrer, or by motion in arrest of judgment.

A demurrer in effect was filed, but defendants did not abide by it, but when it was overruled they pleaded over, and made no motion in arrest of judgment. The insufficiency of the petition is, therefore, not a question here.

(2.) The petition is sufficient. The undertaking of defendants was to hold Prather harmless for all claims against the vessel, that is, from all debts due by Prather on account of the vessel, except those from which he was released by these creditors, whose release was "above signed." On the construction which the defendants give to their obligation it would be wholly useless, for if it applied only to the debts subsequently contracted on account of the boat, the plaintiff was not responsible for them at all; or, if only to debts which were a lien upon the boat, the boat itself amply secured them, and the plaintiff would not be benefited by it. It would be a guarantee to Mrs. Barker, not to him. But the sole object of it is "to defend and save *the said John G. Prather* free and harmless of any and all claims and demands that may arise or (that may) be brought against said steamboat, excepting those above signed." Now, "those above signed" were claims for "indebtedness *due*" the signers. Hence the expression "that may arise or be brought against the steamer" does not mean debts to accrue, but means such existing debts as may be presented, because "those above signed," to which the language equally applied, are expressly stated to be debts already due. And the guarantee is to protect Prather from all claims and demands against the boat, that is, from all claims and demands against him on account of the boat. The written contract thus includes all claims and demands which had been contracted by the officers and agents of the boat, without qualification. This is the plain meaning of the written language, and no proof of usage is admissible to vary or contradict it.

Hearne vs. New England Ins. Co., decided at this term.

To exclude these debts from their guarantee, the defendants (p. 21) offered proof to show that "the word *steamboat debts* is a well-known term among steamboat men and merchants in this city (New Orleans) and others dealing with them, and that the meaning of that word is *debts that have a lien or privilege on the boat*," &c.; and, on page 22, that "when a debt could not be enforced against the boat, * * * it ceased to be a debt of the boat, though it might remain a debt of the owners." This proof was properly excluded—1st. For the reason above given. 2d. Because the words to which the proof relates are not the words of the guarantee, nor their equivalents. But if they were, the proof of customary use of certain special words would not apply to equivalents. 3d. Because, whatever be the customary meaning of the phrase in question, the context shows that the object of the agreement was to secure the plaintiff against all liability arising from his past ownership of the boat. It was his liability, and not that of the boat, which was to be protected from "all claims and demands that may arise or be brought against the said steamboat." The reference to the boat in this contract is merely to fix the origin of the liability. It is not said or implied that the debts in question are now liens upon the boat or debts of the boat. It is "all claims that *may arise*"—meaning, as shown above, all claims that *have arisen* against the boat that the plaintiff is guaranteed against.

II. The bill of exceptions (p. 22) relating to the refusal of the court to charge that written authority was necessary to authorize one partner to sign the firm name to the guarantee, does not show what the proof was, so that this court can judge whether the instruction was called for. The proof might have tended to show that both partners signed the guarantee, each signing his own

name, or that both were personally present, and, though but one signed, that he signed in the presence of and by the direction of the other, or that the transaction was within the scope of the partnership business; that the partners were the real owners of the boat, and that Mrs. Barker, if such a person existed, was only a trustee for them, or that they subsequently took the boat from her to secure themselves for their guarantee, and so recognized and benefited by it.

III. Bell's testimony does not contradict or vary the written agreement between the parties, and evidence is admissible which thows light upon a written agreement, or explains its meaning consistently with its terms.

MONTGOMERY BLAIR,
Of Counsel for Defendant in Error.

February, 1875.

Supreme Court of the United States.

WM. MORAN & ROLAND H. NOBLE,

versus

JOHN G. PRATHER.

Brief in behalf of Moran & Noble.

BENTINCK EGAN, *Attorney,*

Clark & Hofeline, Book and Job Printers, 112 Gravier street.

Supreme Court of the United States.

WM. MORAN & ROLAND H. NOBLE,

versus

JOHN G. PRATHER.

This is a writ of error prosecuted by plaintiffs from a verdict and judgment rendered against them in solido on a bond purporting to be signed by Moran and Noble, a commercial firm composed of plaintiffs in error, in the case of John G. Prather vs. Moran & Noble, from the Circuit Court, for the Fifth Circuit and District of Louisiana.

Plaintiff alleges in substance that he is a citizen of the State of Missouri, and resident of St Louis; that R. H. Noble & Wm. Moran, residents of New Orleans, formerly commercial partners, and doing business in said city, in the year 1869, under the name and style of Moran & Noble, are indebted to him as a firm, and in solido as individuals, in the sum of $1139.10 and legal interest from 30th of May, 1871, and in the further sum of $1127.46, with interest from 30th November, 1871, for this to-wit: That he, with one Wm. H. Thorwegan and

other persons, whose names will be proven on the trial, were at the time the debts herein after spoken of originated commercial partners in the use and navigation of the steamer called the Bart Able; that on the 25th of September, 1868, Wm. H. Thorwegan sold all his interest in said steamboat to petitioner, and one other person, his interest being 6-32 of said boat, all of which will appear from a copy of said sale, to be produced at the trial; that at the time of said sale, and as a part of the consideration he did bind and obligate himself to hold the said Thorwegan, harmless, and free from all debts of the steamer Bart Able and owners, existing against her at the date of said sale, and from any liability therefor, and to reimburse him for any and all debts then existing, and that he might be compelled to pay on account of having been an owner of said boat; that subsequently to this, he being the owner of 17-32 of said boat, did on the 1st of September, 1869, sell all his interest in her to Mrs. Mary F. Barker, for the sum of six thousand dollars, which will appear from the certified copy of the bill of sale to be produced at the trial; that the boat was very valuable, and as an inducement for the sale, Mary F. Barker, was to assume and pay all debts existing against the boat at the time, but that in order to secure this protection, and not relying upon the vendee to do this, he required other security against the existing debts of said boat, and demanded responsible persons to sign a bond for his aforesaid protection, and that the defendants, then a commercial firm, did agree to give him a bond of indemnity against said debts, and on the

20th of September, 1869, the day previous to said sale being drawn up, they bound themselves and their heirs in solido, to defend and save him, free and harmless, from any, and all claims and demands that may arise or be brought against said steamboat, excepting the claims of certain persons who had released him (Prather) from any liability, and said Moran & Noble signed said obligation and delivered the same to him, a copy of which is annexed; that subsequently to this a judgment was rendered in the Supreme Court of Louisiana, on appeal from the Fourth District Court for the Parish of Orleans, in the suit of John A. Stevenson vs. John G. Prather et als., and among said defendants in judgment, was Wm. H. Thorwegan; that the debt sued on, was a debt of the boat and owners, arising while Thorwegan was a part owner; that an execution issued on said judgment, and Thorwegan was compelled to pay the same, with interest and costs, amounting to $1139.10, on the 30th of May, 1871; that subsequently a judgment was rendered in the suit of D. & J. D. Edwards vs. Wm. C. Harrison, et als., owners of the steamer Bart Able, for $1127.46, including interest and costs; that Wm. H. Thorwegan, was one of the owners of the boat at the time the debt accrued; that it was a debt of the boat and owners, and he was one of the defendants in said suit, against whom judgment was rendered; that petitioner was also an owner, and was condemned in solido with said Thorwegan, et als.; that an execution issued on said judgment, and said Thorwegan was compelled to pay the same interests and costs, on the 30th of

November, 1871; all of which will more fully appear from the records of said suit; that Thorwegan demanded of petitioner that he should repay him said sums so paid out on said executions, in accordance with his obligation to indemnify him as aforesaid, and that he did repay said Thorwegan, said sums of money and interest thereon, up to 1st of January, 1872. See petition, R. p. 1 to 3.

The bond or document referred to in the petition is as follows:

NEW ORLEANS, Sept. 20th, 1869.

We, the undersigned, creditors of the steamer Bart Able, do hereby agree to release John G. Prather, of St. Louis, from all indebtedness due us by the steamer Bart Able, *so far as the said John G. Prather is concerned.*

[Signed.] MORAN & NOBLE,
J. S. SIMONDS,
McCLOSKY, MASON & Co.,
Per pro JOHN HENESSY,
T. R. MEDLEY,
JOHN WILSON & Co.,
D. C. McCAN,
BRADY & PALMER.

NEW ORLEANS, Sept. 20th, 1869.

We, the undersigned of the city and State aforesaid, do hereby bind ourselves and our heirs, *in solido*, to defend and save the said John G. Prather, of St. Louis, State of Missouri, seventeen-thirty seconds owner of the steamer Bart Able, free and harmless of any and all claims and

demands that *may arise or be brought against said steamboat*, excepting those above signed.

[Signed.] MORAN & NOBLE.

R. p. 3.

Moran & Noble filed an exception to the suit on the following grounds:

1st. That the petition does not set forth the names of the owners of the steamer Bart Able.

2d. That the act of sale of the boat from Thorwegan to the plaintiff in the suit, and referred to in said petition, has not been annexed thereto, and appearers are desirous of oyer thereof.

3d. That the act of sale of said boat from plaintiff to Mary F. Barker, alleged and set up by plaintiff, has not been annexed to his petition, and appearers are desirous of oyer thereof.

4th. That appearers are desirous of oyer of the original bond alleged to have been signed by them, a pretended copy of which has been annexed to the plaintiff's petition.

5. That the petition filed in this cause sets forth no cause of action against appearers. See Exception, R. p. 6.

On the 10th of January, 1873, after hearing pleadings and counsel, the Court took the exception under consideration. R. p. 6. On the 13th of January the exception was dismissed as frivolous and interposed for delay only. See judgment dismissing exception, R. p. 6.

On the 14th of January, 1873, defendants filed separate answers reservingt heir right to the exception heretofore

filed; they pleaded a general denial to all and singular the allegations contained in plaintiff's petition. R. p. 7.

The errors assigned are as follows:

First, That the Court erred in dismissing this exception; the defendants were entitled to a view or oyer of the several documents referred to in plaintiff's petition,—and particularly the original bond alleged to have been signed by them, and which was the basis and foundation of plaintiff's suit, and is alleged to be part of his petition.

Second. That the Court erred in dismissing this exception, because the petition on its face, and assuming all its allegations to be true, set forth no cause of action against defendants.

Third. That the Court erred in refusing to permit the defendants to prove, by Edward Conery, Roland H. Noble, Capt. Geo. Kirk, and Capt. George L. Kouns, witnesses present on the trial of the cause, that they, said witnesses, have been doing business in New Orleans with steamboats for many years past; that they are familiar with the custom among merchants and others in their dealing with steamboats in this city; that the word steamboat debts is a well-known term among steamboat men and others dealing with them; that the meaning of that word is debts that bore a lien, and privilege on the boat for necessary supplies, materials, repairs and wages; and in the year 1869, and for some years before and after that date it was confined to and existed but six months against a domestic vessel like the Bart Able, from the date the debt accrued, according to the laws of the State, act of 1855,

and that when a debt could not be enforced against the boat by any of the conservatory processes allowed by the laws of the State of Louisiana, it ceased to be a debt of the boat, though it might remain a debt of the owners. Which testimony being objected to by counsel for plaintiff, the Court sustained said objection and refused to permit it to go to the jury as evidence on the trial of the cause, to explain the meaning of the words debts of the steamer Bart Able as contained in the bond referred to in plaintiff's petition, for which purpose defendants had offered it; defendants took this, their bill of exceptions, to the ruling of the Court. R, pp. 21 and 22.

Fourth. That the Court erred, in refusing to sustain defendant's objections to the testimony of Jesse K. Bell, a witness for plaintiff, who stated in substance when on the witness stand, and in presence of the jury, that he was the agent of the plaintiff in this cause at the time of the sale of plaintiff's interest in the Steamboat Bart Able, to Mrs. Mary F. Barker, on the 21st of September, 1869, that he made the sale on behalf of plaintiff, that the boat was then a very valuable vessel, and the interest of plaintiff in her worth much more than the amount for which the interest was sold, and that it was understood at the time of the sale that Mary F. Barker should assume and protect said plaintiff from all existing debts of said boat, and give a bond to that effect. To the admission of which testimony defendants objected, on the ground that the bill of sale of said boat was in writing, that it fixed the value of the interest of plaintiff in the Steamboat Bart Able at

the time of said sale, and that parol evidence was not admissible to explain, vary, or control the written act of sale of said boat, nor as to what may have been said before, at the time of making it, or since. C. C. 2256, (old Ed.) that defendants in this cause were not parties to said contract or agreement in reference to the sale of said boat, and were not bound by any agreement or understanding between the said parties in reference to the value of said boat, or the debts to be assumed; that this suit is against them alone as sureties on the bond alleged to have been signed by them; that their liability, if liable at all, was *stricti juris*, and must be restrained within the precise terms of the contract,—the bond sued upon. See bill of exceptions. R., p. 28.

Fifth. That the Court erred in striking out the words, "*and ought to be shown by written evidence*," the last sentence of the first charge, requested by the defendants to be given by the Court to the jury. Said charge being as follows:

1st Charge. "The law is, that one member of a commercial firm has no authority to bind the firm by signing the firm name to a bond executed for the benefit of third persons, unless he has been specially authorized by his co-partner to do so, or that his act in doing so, has been ratified since it was done by his co-partners, and in that event the parties would only be liable each for his share, that is one-half each, where there are two, as solidarity in obligations is never presumed, and commercial partners, though liable in solido, are so only in transactions con-

nected with their commercial business. The party alleging this authority, or ratification of this act, must show it clearly and positively to your complete and entire satisfaction, by competent evidence. It cannot be inferred, *and ought to be shown by written evidence.*

Sixth.—That the Court erred in striking out and refusing to give the second charge requested by defendants, to the jury, or any part of it, which reads as follows:

2d Charge. If you find, from the evidence, that the bond of indemnity referred to in plaintiff's petition, and bearing date 20th September, 1869, was executed by defendants, or either of them, and which reads as follows, to-wit:

NEW ORLEANS, LA., Sept. 20th, 1869.

We, the undersigned, of the city of New Orleans and State aforesaid, do hereby bind ourselves, and our heirs in solido, to defend and save the said John G. Prather, of St. Louis, Missouri, seventeen thirty-seconds owner of the Steamboat Bart Able, free and harmless of any, and all claims and demands, that *may arise or be brought against said Steamboat*, excepting those above signed.

(Signed) MORAN & NOBLE.

You will next enquire when the debts which plaintiff claims to have paid, arose or were brought against the steamer Bart Able; and if you find from the evidence, that those debts arose or were brought against the steamer Bart Able previous to the date of the bond, (20th September, 1869,) though paid afterwards, then defendants are not liable, and your verdict will be in their favor.

Seventh. That the Court erred in striking out and refusing to give the fourth charge requested by defendant to the jury, which reads as follows:

Fourth Charge.—In order to entitle plaintiff to recover in this cause, he must establish by competent evidence and to your satisfaction,

First. That the defendants or either of them signed the bond referred to in his petition.

Second. That he was legally liable for the debt he now seeks to recover.

Third. That he actually paid it, and

Fourth. That the debt arose, and was brought against the steamboat Bart Able, since the date of the bond, the 20th of September, 1869. And if he fails in establishing any one of those four facts, the defendants are not liable, and your verdict must be in their favor.

Eighth. The Court erred in refusing to give the fifth charge requested by the defendants to be given to the jury, and mislead the jury, by the one given in lieu of it; said fifth charge reading as follows;

Fifth Charge.—Legal agreements having the effect of law upon the parties, none but the parties can abrogate or modify them. The words of a contract are to be understood like those of a law, in their common and usual signification; terms of art or technical phrases are to be interpreted according to their received meaning, with those who profess the art, or profession to which they belong. Now all debts of the owners of a steamboat are not debts of the boat. In order to ascertain what are

debts of the boat, you must examine the evidence and asccertain from it, what is understood by the words, debt of the steamboat (Bart Able) as contained in the contract; for if the debts claimed in this suit were not such debts as could be enforced against the steamer Bart Able, they would not come within the terms of the obligation or bond referred to in plaintiff's petition; even though they should have arisen or been brought since the date of the bond, 20th September, 1869. A claim against a boat is stale when the creditor has an opportunity to enforce it, and neglects to do so for a reasonable time, and the guide in courts of admiralty, is by analogy to the State laws. In this State, the debt against a steamboat is barred in six months, consequently this debt is not one that could be enforced against the steamer Bart Able, and they are not liable on the bond in suit, and you will find in their favor. The charges as given, reads as follows:

Legal agreements having the effect of law upon the parties, none but the parties can abrogate or modify them; the words of a contract are to be understood like those of a law, in their common and usual signification; terms of art, or technical phrases, are to be interpreted according to their received meaning, with those who profess the art or profession to which they belong.

Now all debts of the owners of a steamboat are not debts of the boat; in order to ascertain what are debts of a boat, you must examine the evidence, and ascertain from it what is understood by the words, debts of the steamer (Bart Able) as contained in the contract; for if the debts

claimed in this suit were not such debts as could be enforced against the steamer Bart Able, *then they are covered by the bond*. A claim against a steamboat is stale when the creditor has an opportunity to enforce it, and neglects to do so for a reasonable time.

The original charge being altered from that requested by defendants by the Court, adding in the words, "*then they are covered by the bond*" and striking out the words, "they would not come within the terms of the obligation or bond referred to in plaintiff's petition, even though they should have arisen or been brought since the date of the bond, 20th September, 1869; and also "the words, and the guide in courts of admiralty is by analogy to the State law. In this State, the debt as against a steamboat, is barred by six months, consequently this debt is not one that could be enforced against the steamer Bart Able. They are not liable on the bond in suit, and you will find in their favor. See bill of exceptions, R. pp. 22 to 24.

Ninth. The Court erred, in refusing to grant a new trial to defendants, which they both applied for by separate motions; Noble's being as follows:

1. Because the verdict of the jury, and judgment thereon is contrary to the law and the evidence.

2. Because there was no evidence offered to show that defendant, R. H. Noble, ever signed the bond referred to in plaintiff's petition, and on which this suit was based; and his own testimony showed clearly and positively that he did not sign said bond, and knew nothing of it ever having been signed, until some years after it had been

signed, when it was shown to him in the Seventh District Court, in this city, just previous to this suit having been brought.

3. Because the jury disregarded the first charge given by the Court, in finding the verdict in favor of plaintiff, and against defendants in *solido*, and the judgment is clearly erroneous in condemning defendants in solido, because, even supposing the bond was signed by one member of the firm with the consent of the other, (which fact was not shown), it would not bind them in solido, but only each for one-half, *as the Court has charged the jury.*

4. Because the verdict and judgment are erroneous in this; that the bond bears date on the 20th of September, 1869, and was given to protect and save John G. Prather, free and harmless of any and all claims, and demands that *may arise or be brought against the steamer Bart Able*, and the allegations contained in plaintiff's petition, as well as the testimony offered by plaintiff to support them, showed clearly and positively, that the debt plaintiff seeks to recover, arose and was brought not against the steamer Bart Able, but against four persons who were her owners long previous to the date of the bond, and the defendants, if liable at all, are only so as sureties. Their obligation must be strictly construed, and they can only be held to the precise terms of their obligation; and to condemn them to pay the claim set up by plaintiff, is not according to the precise terms of their obligation on the bond; as the debt sued for, is not a debt that could be brought against the steamer Bart Able, which boat is now

in the port of New Orleans, but a debt that arose, and was brought against four persons, (whose names are shown in the records, offered by plaintiff in evidence), many years before the date of the bond.

5. Because the jury disregarded the 3d charge given by the Court, which reads as follows: The defendants in this cause are sureties and sought to be made liable as such. The law is that there are no presumptions against sureties; they can only be held to the precise terms of their obligation; their contract is to be construed strictly, and cannot be extended by implication beyond its express terms.

6. Because the plaintiff should have shown by written evidence that he was responsible for the debt, as the assumption, or promise to pay the debt of a third person, must be shown by written evidence. (Acts 1858, p. 148, sec 3).

7. Because plaintiff has not shown that he ever paid the debt he seeks to recover; the testimony of W. H. Thorwegan, (R. p. 18), his own witness, on cross-examination shows that it never has been paid. See motion for new trial of R. H. Noble, R. p. 25, also of Moran, R. p. 24.

ARGUMENT—FIRST POINT.

The exception ought to have been maintained; the defendants were entitled to oyer of the several documents referred to in plaintiff's petition before they could be compelled to answer; an examination of these documents was essential to enable them to prepare their defence, particularly the bond, but the law is positive upon this point.

By art. 174 of La. Code of Practice, when the action is founded on a notarial or public act, an authentic copy must be annexed to the petition, in order that it may be communicated to the defendant if he require it.

By Art. 175, C. P. But if the title on which the demand is founded be an act under private signature, or note bearing the signature of the defendant, the original of such an act need not be annexed to the petition, *provided*, that if the defendant pray a view, or oyer of the document declared upon, the Court shall order the same to be filed within a reasonable delay, and in default of plaintiff's complying with said order, his petition shall be dismissed. This is a positive law in the State of Louisiana, and has been repeatedly recognized, and enforced by numerous decisions of the Supreme Court of that State, which are binding upon the Circuit Court. See Fletcher vs. Cavilier, 4 L. 273; Mallien vs. Bayer, 14 A. 621; Acts of 1789, Sec. 34, 1st Statute at Large, p. 73.

This exception is not frivolous, nor was it interposed for delay only. As remarked by the Judge of the lower Court, it was based upon a positive provision of law, and is founded upon reason and justice; the defendants were entitled to a view of the bond purporting to be signed by them. The notarial certificate, at the foot of the bond, proves nothing; he merely certifies it to be a true and correct copy of an original presented to him for identification; he does not pretend to certify to the genuineness of the signatures of the parties who signed it. It is not a notarial or public act within the meaning of Art. 175, the Code

of Practice, referred to above. The notarial or authentic act, as relates to contracts, is one executed before a notary, or other public officer, authorized to execute such functions, in presence of two witnesses. La. C. C., 2231. There were no witnesses to this pretended bond or the notarial certificate, and the notary had no more right to certify it to be a copy of any other document than any private individual would.

SECOND POINT.

The second point in the exception is, that the petition sets forth no cause of action.

The plaintiff alleges in his petition that he and another person (not named) purchased 6-32 seconds of the Bart Able from Wm. H. Thorwegan, on the 25th of September, 1868; that as a part of the consideration of the sale he bound and obligated himself to hold Thorwegan free and harmless from all debts of the boat and owners existing against her at the time of said sale, and to reimburse him from any debts he might be compelled to pay in consequence of having been an owner of the boat; that Thorwegan has paid two judgments rendered against him for debts due by the owners of this boat previous to September 25, 1868, amounting in principal, interest and costs to $2266.56. See the receipts of the sheriff, R. pp. 19 and 20. These claims, with interest, amounts to but $1890.04, and without interest to but $0683.81. Now the plaintiff's obligation to William H. Thorwegan was only to hold him harmless from the debt,

but not the interest or costs; but assuming that it covered the interest, it certainly did not embrace the costs; he does not pretend that it went to that extent, and they appear to have been a pretty heavy item—nearly $400. Again, this was a verbal agreement between plaintiff and Thorwegan, and yet he pretends it was part of the consideration for the sale, but is not embodied in it; nor does he pretend that his co-purchaser, whose name he withholds, assumed the same responsibility. By Art. 2256 of La. C. C., "Neither shall parol evidence be admitted against, or beyond what is contained in the acts, nor as to what may have been said before, at the time of making them, or since."

This is a well recognized principle of law by repeated decisions of the Supreme Court of the State of Louisiana. Clark vs. Farrar, 3 M., 250; 8 M., 614; Henderson vs. Stone, 1 N. S., 641; Gould vs. Bridgers, 3 N. S., 694; Cook vs. Parkinson, 16 L., 129; Arnous vs. Dovern, 18 L., 43; Labouve vs. DeClouet, 19 L., 381; Hill vs. Hall, 4 R., 416; Patterson vs. Hall, 1 A., 108.

Now, if the plaintiff is prohibited from proving any consideration in the sale from Thorwegan to himself outside of the act itself, he has no right to show the assumption referred to in his petition, and the debt Thorwegan paid was a judgment rendered against himself, and for which he had no recourse against Prather.

Again, Prather's obligations, according to the allegations of his petition, appear to have been quite extensive, sufficient to cover any and everything. A simple examina-

tion of them, in connection with the testimony of himself and Thorwegan (R., pp. 21 to 19) must convince the Court that this suit is a conspiracy on the part of these two men to injure the defendants.

The defendants' obligation on the bond referred to in plaintiff's petition was much more limited than those Prather pretends he assumed. Their obligation was in writing, and according to its terms, as alleged by plaintiff, it was to defend and save J. G. Prather (*not Wm. H. Thorwegan*) free and harmless of any and all claims and demands that *may arise* or be brought against said steamboat (*Bart Able*), excepting those above signed. Now the claims sued on were not debts of the steamboat Bart Able, nor did they arise since the date of the bond; they were debts of the former owners of the boat, and were contracted previous to 1868. There is a very great difference between the debts of a boat, an inanimate thing, and the debts of the owners of the boat.

The contract of surety is to be construed strictly both at law and in equity, and his liability is not to be extended by implication beyond the precise terms of his contract. Miller vs. Stewart, 9 Wheat., 680; Spring vs. Bank of Mount Pleasant, 14 Peters, 201; United States, vs. Boyd, 15 Peters, 187; Smith vs. United States, 2 Wallace, 219.

There are no presumptions against sureties that can only be held to the precise terms of their obligation. La., C. C. 3008. *Fidussore is strictissime juris, et non durat, vel extenditur, de re ad rem, de persona, ad personam, de tempore,*

ad tempus. Bell vs. Norwood, 7 Louisiana, 103; McMichael vs. Gillespie, 7 Robinson, 13; Erwin vs. Canal Bank, 12 R, 227; Canal Co. vs. Hogan, 1 Ann., 62; Freeland vs. Briscoe, 3 A., 255; Cartwright vs. McMillan, 3 A., 685.

When a contract is in writing the Court will not presume that the parties make use of words to which they attach no meaning. Rolland vs. McCarty, 17 La., 77.

The intention of the parties must be determined by the words of the contract, if possible. Willis vs. Compton, 3 R. 171; Aiken vs. Drummond, 2 A., 99. When the words of a law, treaty, or *contract*, have a plain and obvious meaning, all construction in hostility with such meaning is excluded. Green vs. Biddle, 8 Wheat., 1.

Now, giving the plaintiffs the full benefit of all the allegations contained in his petition, and assuming for the sake of argument that they are true, he has no claims against the defendants, because the bond is restricted to the future by the words, "*may arise, or be brought against said boat,*" excepting those above signed, it does not cover debts due by the owners of the boat, or suits brought against them years before the execution of the bond. And if we search for the intention of the parties it will be found in the last sentence, the words, "excepting those above signed." The first names among them are Moran & Noble. The obligation they sign is to release the steamboat Bart Able so far as *John G. Prather is concerned.* There is no release of their claims against Wm. H. Thorwegan or any of the other owners of this boat; the release

is restricted to John G. Prather alone, and only so far as he is concerned. This obligation is on the same sheet of paper as the bond sued upon, and must control its interpretation, if there was any doubt about the intention of the parties. But there can be no doubt about it. The intention of the parties is expressed in words as plain and unequivocal as the English language is capable of, and is limited to claims and demands that *may arise, or be brought against the steamboat Bart Able*, and to hold that it covered demands that had arisen or been brought against persons who had been owners of the steamer Bart Able, would be to make another and a different contract for the parties than that they made for themselves, which the Court cannot do. See La. C. C., 1940.

THRID POINT.

The Court certainly erred in refusing to permit defendants to prove by E. Conery, R. H. Noble, Geo. H. Kirk and G. L. Kouns, that they had been doing business in New Orleans with steamboats for many years past; that they were familiar with the customs among merchants and others in their dealing with steamboats in this city; that the words steamboat debts is a well known term among steamboat men, and others dealing with them; that the meaning of those words is debts that bore a lien and privilege on the boat, for necessary supplies, materials, repairs and wages, and was, in the year 1869, and for some years before, and after that date confined to and existed but six months against a domestic vessel, like the

Bart Able, from the date of the debt accrued, according to the laws of this State, Acts 1858, p. 111; and that when a debt could not be enforced against the boat by any of the conservatory processes allowed by the laws of the State of Louisiana, it ceased to be a debt of the boat, though it might remain a debt of the owners. R. pp. 21 and 22.

By Art. 1941, La. C. C. the words of a contract are to be understood like those of a law, in the common and usual signification; without attending so much to grammatical rules as to general and popular use.

By Art. 1942, terms of art and technical phrases are to be interpreted according to their received meaning, with those who profess the art or profession to which they belong.

In the case at bar, the testimony was offered for the purpose of showing the meaning of the words, debts of the steamboat Bart Able. It is a technical phrase, has a general and popular use, and as we have shown above, the testimony ought to have been admitted.

FOURTH POINT.

The Court erred in refusing to sustain the defendants' objections to the testimony of J. K. Bell. See bill of exceptions, R., p. 28. The bill of sale of the boat was in writing, it fixed the value of the interest of plaintiff in the boat, at the time of the sale, and parol evidence was not admissible to explain, vary, or contradict, the written act, nor as to what may have been said before, at the

time of making them, or since. C. C. 2256. Again, the defendants were not parties to the contract or agreement between the plaintiff and Mrs. Mary F. Barker, and were not bound by any understanding between said parties in reference to the value of the boat or debts to be assumed; this suit being against them as sureties on a bond alleged to have been signed by them, their liability if liable at all, is *stricti juris*, and must be restrained within the precise terms of the contract, the bond sued upon.

FIFTH POINT.

The Court was clearly wrong in striking out the words, "*and ought to be shown by written evidence*," the last sentence of the first charge requested by defendants.

It is clear that one member of a commercial firm has no authority to bind the firm by signing the firm's name to a bond given for the benefit of a third person; the act is not within the scope of the business of a commercial firm. Now the contract or bond being in writing, and signed with the firm's name, would only be binding upon the party executing it; and if he, or any other person were to contend that he was authorized by his co-partner to execute the bond, he should show that fact by evidence of equal dignity; otherwise we would have one man bound by this written act, his own signature and the other, bouud on the same bond by parol evidence, though he never signed it. But the law is positive upon this point.

By the act of 1858, page 148, section 3rd, of La., hereafter parol evidence shall not be received to prove

any promise to pay the debt of a third person, *but in all such cases* the promise to pay shall be proven by written evidence signed by the party to be charged, or his specially authorized agent or attorney in fact.

SIXTH POINT.

The Court erred in striking out and refusing to give the second charge requested by defendants. R. pp. 22 and 23. This charge embodied the bond referred to in plaintiff's petition, and requested the jury to ascertain from the evidence, first, whether it was signed by defendants or either of them; second, when the debts which plaintiff claims to have paid arose, or were brought against the steamboat Bart Able, and that if the debts arose, or were brought against the steamer Bart Able previous to the date of the bond, 20th of September, 1869, though paid afterwards, then defendants are not liable.

It is essential to plaintiff's right to recover that he should have proved that the bond was signed by defendants or either of them. The bond he exhibited was but a pretended copy of an original not produced, and the defendants could not avow, or deny, their signature. The plaintiff did not pretend that the bond referred to in his petition was the original, and on its very face it is represented to be a copy. See the certificate of the notary at the foot of the bond. R., p. 3.

Again, assuming for the sake of argument, that defendants, or either of them, did sign the bond, it is restricted to claims that *may arise or be brought against the steamboat*

Bart Able, since its date, 20th of September, 1869, and would not cover claims brought previous to its date, though paid afterwards, and with much less reason would it cover claims against the former owners of the boat and for which she was in no manner liable. When a contract is in writing, the Court will not presume the parties make use of words to which they attach no meaning. Rollins vs. McCarty, 17 L., 77. In the case at bar they have made use of the words, "*may arise or be brought against ths steamer Bart Able;* these words refer to the future, that is something to occur since the date of the bond and cannot be interpreted to mean the past, and especially claims against her owners, and that this was the intention of the parties we may infer from two circumstances; first, the closing sentence of the bond, "*except those above signed.*" The first name we find among those above signed is Moran & Noble, and referring to what they signed, we find it to be a release *of the steamboat Bart Able, so far as John G. Prather is concerned.* R., p. 3. There is no release given in favor of the other owners; there were three of them besides Prather. Second. The claims plaintiff now seeks to recover were suits pending against himself, Harrison, W. H. Thorwegan and Terrell; they were pending against them previous to the 25th of September, 1868. According to the allegations of plaintiff's petition, one bears interest from the 21st February, 1868, and the other from 8th and 25th August, 1868. See sheriff's receipts, R., pp. 19 and 20. Appeals had been taken to the Supreme Court of the State of Louisiana.

They were only paid in May and November, 1871. See sheriff's receipts, R., pp. 19 and 20. Now if Moran & Noble had assumed them, they would have been inserted in the bond, or paid in 1869, the date the bond was given. The suits appear to have been on notes, to which the parties had no defence. See testimony of Prather, R., pp. 13 to 15, and Thorwegan, R., pp. 17 to 18; and in the last of the cases they were condemned to pay $80 damages for a frivolous appeal. See sheriff's receipts, R., p. 20. Again, the suit was brought on the 25th of June, 1872, more than one year after the date Thorwegan paid the first of those claims. All these circumstances go to show that this claim against the defendants was an afterthought on the part of Prather and Thorwegan; they knew well that it was not covered by the bond, and made no claim against the defendants for protection or re-imbursement until nearly four years after the date of the bond. Their conduct would have been very different if the bond was given to protect them against those claims; they would have notified the defendants in September, 1869, that those two suits were pending against them in the Fourth District Court; that they could be paid with but little interest or costs, instead of appealing and litigating the cases for years, without the slightest notice or warning to the defendants, and then coolly call upon them for the original claims, interest and costs. This is not the way men usually act in a straightforward or business transaction.

But to return to those two cases, and quoting from the

opinion of the Supreme Court of La., John A. Stevenson vs. John G. Prather, et als., 23 Ann. 434, the Court say: This suit was commenced by attacking the interest, or shares of three of the owners of the steamer Bart Able, on a debt contracted by them before Harrison, the other joint owner of the boat had, acquired an interest in her. Harrison moved to dissolve the attachment on the ground that the owners were commercial partners, and he resided in this State. There was judgment maintaining the attachment, and defendants appealed. (This judgment was affirmed.)

D. & J. D. Edwards vs. W. C.Harrison, et als., 23 Ann. 473, the Court say: Defendants, who are Captain and owners of a steamboat, have appealed from a judgment with privilege, for the amount of two notes given for work and materials furnished and done on said steamer. The defence is a simple general denial, interrogatories were propounded to defendants to prove the debt and its nature which were answered affirmatively. The appeal was taken in January, 1869, and the purpose seems to have been delay; the prayer for damages must be allowed, ($80.)

For the balance of our argument bearing upon this point, we refer the Court to our second point.

SEVENTH POINT.

The Court erred in refusing to give the fourth charge requested by the defendants, R. p. 23. It was essential to plaintiff's right to recover in the suit, that he should have established by competent evidence and to the satis-

faction of the jury, that defendants or either of them signed the bond referred to in plaintiff's petition; 2d, that he was legally liable for the debt he now seeks to recover; 3d, that he actually paid it; 4th, that the debt arose and was brought since the date of the bond; as we have argued most of the points involved in this charge, we will not repeat the arguments here.

EIGHTH POINT.

The court erred in refusing to give the fifth charge requested by the defendants, and misled the jury in the one given in lieu of it, R. pp 23 to 24. The charge requested was in strict accordance with well settled legal principles, and this fact was admitted by the Court, by giving the most of the charge as requested; but at the same time nullifying it by striking out the words, "*they would not come within the terms of the obligation or bond referred to in plaintiff's petition, even though they should have arisen or been brought since the date of the bond, 20th September, 1869.* And substituting the words, "*then they are covered by the bond,*" and striking out the five last lines.

By the Act of 1858, p. 111, a privilege against a steamboat is prescribed in six months from the date the debt is contracted. The debts of a boat are those bearing a privilege on her. See C. C. 3204. After the privilege was prescribed by the laws of the State of Louisiana, the debt could not arise or be brought against the boat, though it might be brought against her former owners.

It ceased to be a debt of the boat; the statutes of limitations barred it as against the boat.

The conservatory process, allowed by the laws of Louisiana, was sustained by this Court in the case of Leon vs. Galceran, 11 Wallace, 185.

It has been repeatedly held, that courts of admiralty, like courts of equity, govern themselves by analogies to the common law limitation of actions, and only under very strong circumstances departs from them. Willis vs. Dow, 3 Mason, 95, 164; The Sara Ann, 2 Sumner, 213; The Rebecca, 5 Robinson, 105.

The common law limitation of actions in the State of Louisiana is six months. There were no circumstances to depart from it in this case, as we have shown above.

But in the case at bar, the action was at law and not in admiralty; and the laws of the State of Louisiana are positive that if it ever was a debt of the steamboat Bart Able, and for which she was liable by article 3204 of the La. C. C., it could only be enforced against her *in specie* within six months from the date it was contracted; and from the sheriff's receipts, R., pp. 19 and 20, we find that one of the claims bore interest from the 21st of February, 1868, and the other from the 8th and 25th of August, 1868; they were consequently both contracted more than a year previous to the date of the bond, and more than four years previous to the plaintiff bringing this suit, 25th June, 1872, consequently they were not debts of the steamboat Bart Able, referred to in the bond, even if they ever had been such, which was not shown, though the

charge was expressly asked. But to show the error of this charge more clearly, we will quote a portion of it. Now, all debts of the owners of a steamboat are not debts of the boat. In order to ascertain what are debts of a boat, you must examine the evidence and ascertain from it what is understood by the words debts of the steamboat (Bart Able) as contained in the contract, for if the debts claimed in this suit are not such debts as could be enforced against the steamboat (Bart Able), then they are covered by the bond." This charge is contradictory on its face. It tells the jury that all debts of the owners of a boat, are not debts of the boat; that in order to ascertain what are debts of a boat, they must examine the evidence, and ascertain from it what is understood by the words debts of the steamboat (Bart Able), as contained in the contract, and that if the debts in this suit are not such debts as could be enforced against the steamboat (Bart Able), *then they are covered by the bond.* The terms of the bond were to save John G. Prather free and harmless of any and all claims that *may arise or be brought against the said steamboat* (Bart Able). The Court made it to read, in substance, to save John G. Prather free and harmless from any and all claims and demands that he may have to pay, or may be brought against him. In other words, the Court made a contract for the parties in this charge, that they had not made for themselves, and entirely different and distinct from the one sued upon, both in letter and spirit; this it had no right to do, as we have shown above.

NINTH POINT

The Court erred in refusing to grant defendants the new trial asked for (see motion for new trial, R., pp. 25 and 26), where the grounds are fully set out; but as most of our argument bearing upon this motion is embraced in our previous argument, we will not repeat it here. One ground of this motion was that the jury had disregarded the first and third charges given by the Court. The first charge was, in substance, that one member of a commercial firm has no authority to bind the firm by signing its name to a bond executed for the benefit of third persons, unless specially authorized to do so by his co-partner, and in that event the parties would only be liable each for his own share, that is, one-half each where there is two, as solidarity in obligations is never presumed, and commercial partners though liable *in solido*, are only so in transactions connected with their commercial business. The verdict and judgment in this case is against the defendants *in solido*. See verdict, R., p. 21, and judgment, R., p. 26. This was in direct violation of the instructions and request given by the Court, as shown above, and the positive provisions of law. C. C., 2075, 2076, 2088. Our argument bearing upon the third charge, which was given by the Court and disregarded by the jury, is covered by our argument on the second point.

For these reasons, we respectfully ask, that the judgment of the Circuit Court be reversed, and plaintiff's petition be dismissed at his costs.

Respectfully submitted,
BENTINCK EGAN, *Attorney.*

W. P. Bell
Of Counsel for Pltffs in error.